CONTROL OF GOVERNMENT INFORMATION IN LEGAL PROCEEDINGS

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A INTRODUCTION

1. It is perhaps an unfortunate fact of life that Governments necessarily have secrets that allow those governments to function. At the same time open justice is a "*fundamental rule of the common law*",[1] a crucial element of our legal system and the rule of law in Australia.

2. Where governments become involved in legal proceedings, and their legitimate secrets may become at risk of exposure, properly managing secrecy as against open justice is important to preserving both our system of government and the rule of law. The key issue is to make sure that the secret that is being protected is legitimate, rather than something that could or indeed, in some cases, *must* be disclosed.

3. Behind the various mechanisms involved, the greatest aspect of any tradecraft in this field is the role of judgment as to what claims can and should be made, as against those that should not.

4. Recent events highlight the controversy that can arise in this field:

   a. In 2018 the High Court delivered *AB v CD* [2018] HCA 58 (***AB v CD***) commencing the Lawyer X scandal and subsequent Royal Commission in Victoria. We will deal with this matter in greater detail below.

   b. On 7 July 2022, the new Attorney-General Mark Dreyfus QC directed the Commonwealth Director of Public Prosecutions to discontinue the prosecution of Mr Collaery QC. That prosecution alleged that Mr Collaery QC had committed offences under the *Intelligence Services Act 2001 (Cth)* in relation to his work with his client "Witness K" that revealed that ASIS officers had spied on East Timor negotiators in 2004 during negotiations for rights to exploit oil and gas reserves in the Timor Gap.

   c. On 28 July 2022, the Attorney-General tabled the report of the Independent National Security Legislation Monitor (**INSLM**), Grant Donaldson SC, into the Witness J case. That report was highly critical of the manner in which Witness J had been tried, prosecuted and sentenced in complete secrecy pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (**the NSI Act**). While we don't know much about the charges in that case, it appears that Witness J had been an intelligence officer that had used a public forum to raise

[1] *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, [476]–[477] (McHugh JA, Glass JA agreeing)

certain workplace complaints that had exposed some of his former colleagues in the intelligence community. The Attorney-General has requested that the INSLM conduct a review of the NSI Act as a whole.

d. There remains ongoing controversy in relation to the charges against David McBride, a former army lawyer, who has been charged in relation to, among other matters, improperly releasing government information in relation to his activity to allege war crimes by Australian soldiers in Afghanistan.

5. In *AB v CD*, Nicola Gobbo, referred to as EF in the decision and subsequently became known as Lawyer X, was a criminal barrister at the Melbourne Bar that had represented a number of high profile figures in Melbourne's organised crime gangs. Police recruited Ms Gobbo to inform on her clients, breaching client legal privilege to do so. Ms Gobbo's role was concealed from those clients on the basis of public interest immunity concerns. The High Court was called on to consider whether those concerns were legitimate, or whether Ms Gobbo's role should be disclosed.

6. The manner in which *AB v CD* came before the Court is interesting in itself. Victoria's Independent Broad-based Anti-Corruption Commission (**IBAC**) provided a report on Police's use of Lawyer X to the Commissioner of Police for Victoria (**AB**). The report pointed out that Lawyer X's role had the potential to undermine the defence of certain convicted persons that had been represented by Ms Gobbo. The Commissioner provided the IBAC report to the Victorian Director of Public Prosecutions (**CD**). The Victorian DPP concluded that he was under a duty to effectively disclose Lawyer X's role to the convicted persons. Victorian Police assessed the risk of Ms Gobbo's death if that information was released as "almost certain". The Commissioner, AB then commenced proceedings in the Supreme Court of Victoria to prevent the DPP from releasing the information. Other parties joined the proceedings, notably, the Commonwealth Director of Public Prosecutions, arguing in favour of disclosure of the information, and Ms Gobbo was represented arguing for ongoing protection of her role.

7. The High Court found that the affected convictions were unsafe in that they may have been procured by an abuse of the convicted persons' common law rights to privilege. However, as Victorian Police had not disclosed Lawyer X's role in order to protect her and her family against the threat of harm, the convicted persons were left unable to test whether the evidence against them had been procured by an abuse of their client legal privilege.

8. The High Court stated that, even in circumstances where informer death is almost certain:[2]

> "…*where as here, the agency of police informer has been so abused as to corrupt the criminal justice system, there arises a greater public interest*

[2] *AB v CD* [2018] HCA 58 at [2].

in disclosure to which the public interest in informer anonymity must yield."[3]

9. Simply put, *AB v CD* reminds us that the proper administration of justice is more important than one state secret, even where that secret amounts to a person's life or death. The protection of a government secret that protects human life, but results in a corruption of the rule of law cannot stand.

10. This isn't to weaken the protections to human sources generally. The crucial elements here were the use of the accused's own lawyer as a police source, abrogating the accused's fundamental common law right to client legal privilege and the act of keeping that matter secret during the trial of the accused.

11. *AB v CD* acts as a crucial reminder to exercise judgment in deciding which secrets to keep. Errors in this field can both risk human life, and, arguably, a perversion of the course of justice.

12. With that being said, this paper introduces some of the key mechanisms used to properly protect government information in legal proceedings:

    a. Public interest immunity (**PII**) Claims;

    b. Non-publication orders;

    c. Parliamentary privilege; and

    d. Specialty mechanisms – such as witness protection orders and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

13. We begin with a short overview of the principles involved, before examining some of the mechanisms mentioned above, specifically focussing on their use in New South Wales and the Federal Courts.

B PRINCIPLES OF PROTECTING INFORMATION

B.1 Distinction between disclosure to parties as against publication

14. There are two stages to keep in mind as we deal with the protection of government information in legal proceedings:

    a. **Objection to production** – Withholding sensitive information from the parties, for example both the prosecution and the accused, in legal proceedings so that not only can the information not be disclosed to the public, it cannot be used as evidence in any way by either side. An objection to production can take the form of either a challenge to an order for production such as a challenge to a subpoena, or a direct objection to oral evidence to be given by a witness such as in a traditional public

[3] *AB v CD* [2018] HCA 58 at [12].

interest immunity objection under either the common law or s.130 of the *Evidence Act 1995*; and

b. **Non-publication orders** – Allowing the Court and the parties to have full access to the information, but withholding that information from disclosure to the public through orders made, for example, under the *Court Suppression and Non-Publication Orders Act 2010* (NSW).

15. As we will discuss in detail below, sensitive information can only be withheld from the parties and the Court under an objection to production where it will not result in an unfair trial.

B.2 Validity of restrictions on publication depend upon necessity

16. McHugh JA stated in *John Fairfax & Sons Limited v Police Tribunal of NSW* (1986) 5 NSWLR 465, at [476]–[477]:

> The fundamental rule of the common law is that the administration of justice must take place in open court. A court can only depart from this rule where its observance would frustrate the administration of justice or some other public interest for whose protection Parliament has modified the open justice rule. The principle of open justice also requires that nothing should be done to discourage the making of fair and accurate reports of what occurs in the courtroom. Accordingly, an order of a court prohibiting the publication of evidence is only valid if it is really necessary to secure the proper administration of justice in proceedings before it. Moreover, an order prohibiting publication of evidence must be clear in its terms and do no more than is necessary to achieve the due administration of justice. The making of the order must also be reasonably necessary; and there must be some material before the court upon which it can reasonably reach the conclusion that it is necessary to make an order prohibiting publication. Mere belief that the order is necessary is insufficient. When the court is an inferior court, the order must do no more than is "*necessary to enable it to act effectively within*" its jurisdiction.

B.3 Restricting information interferes in normal functions of a Court

17. Jason Bosland and Ashleigh Bagnall state that open justice manifests itself in 3 ways:

a. Proceedings are conducted in open court;

b. Information and evidence presented in court is communicated publicly to those present in the court;

c. Nothing is to be done to discourage the making of fair and accurate reports of judicial proceedings conducted in open court, including by the media.

This includes reporting the names of the parties as well as the evidence given during the course of proceedings.[4]

18. An application to control government information in legal proceedings may strike at each, and possibly all, of these aspects of open justice as follows:

    a. Closure of the Court is commonly required, even if only to determine an application to restrict information;

    b. It may be necessary to tender both confidential submissions and evidence to the judicial officer for the purposes of determining the application to close the court or an objection to production of specific evidence. These confidential submissions and evidence exclude the party that might otherwise resist the application from engaging in the debate on that confidential evidence; and

    c. The Court may make suppression orders restricting the freedom of the press or other attendees to report on the proceedings. Certain details may be prohibited from being publicly reported.

19. This conflict makes such applications inherently controversial. The proper criticisms that are often made are:

    a. Parties to the litigation, even if they do not oppose the protection of information, are often troubled by:

        i. Perceptions that the need for secrecy reflects upon the accused in some way and may influence the determination of the issues in the case in favour of the state interests;[5] and

        ii. The process by which the judicial officer may receive confidential submissions and evidence from the government applicant, which also may subconsciously influence the Court;[6]

    b. Media interests, whether present in Court or in their later reporting on the proceedings, often use the need for such orders as a suggestion of a need for concern on the part of the public that there may be a cover-up;

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[4] Jason Bosland and Ashleigh Bagnall, 'An Empirical Analysis of Suppression Orders in the Victorian Courts: 2008-12' (2013) 35 *Sydney Law Review* 674

[5] The existence or otherwise of a government application to protect certain information has no bearing on the substantive proceedings, and particularly has no bearing on the guilt or innocence of the accused of the matters alleged against them.

[6] Similar to a *voir dire*, the judicial officer must become aware of evidence for one purpose that is inadmissible or prejudicial for another. There is no practical answer to this concern other than continue to expect that a judge has sufficient discipline to properly disregard sensitive evidence from their mind for the purposes of any substantive findings of fact. Judges are highly experienced in doing so as is the case in any evidentiary ruling. It is also important that in criminal matters, juris rather than judges are often the tribunal of fact on the basis of admissible material alone.

c. Judicial officers may consider that such the PII claim represents an unwelcome “headache” or disruption that requires careful management to resolve such concerns and prevent interruption or potential derailment of the underlying proceedings.

20. It is not an easy process for the government applicant either. Time is often tight. The professional onus and rigour on making such an application is very high and akin to an *ex parte* application, where objectivity and appreciation of the points of view of opponents to the application may be required.

21. Inherently the subject matter of the application is also concerned with risk of harm to the functions of government, and potentially national security. In the case of protected witnesses, a person’s life may be at risk. It is difficult to protect information and in particular it is difficult to divide information between that which can be divulged and that which cannot. It is demanding, stressful work for the teams of clients and lawyers that make such applications to the Court.

B.4 The special privilege of the State

22. An application to restrict or prevent the release of government information is a request by the state to receive some special relief from the ordinary powers and mechanisms of the Court to obtain material and hear evidence that may be relevant to the proceedings before it.

23. This special privilege accorded to the state carries with it a heavy onus. Each claim must be responsibly made and solidly based. Any abuse of the special privilege through the making of a spurious or weak claim damages the credibility of the state seeking to make PII claims in the future.

B.5 Balancing between competing public interests

24. Necessarily, adjudicating an application to restrict information is a balancing exercise for the Court between:

a. the public interest in the open administration of justice according to normal processes; against

b. the public interest in protection the functions of government that might be harmed by the inappropriate disclosure of sensitive government information.

25. Both sides of the balancing exercise are public interests. To the extent that an application to restrict information presents some limit on open justice, it must be carefully used to protect that public interest in the rule of law. This restriction applies both at common law as detailed above, and is often codified in the

application of statutory regimes to protect information in Court, such as s.6 of the *Court Suppression and Non-publication Orders Act 2010 (NSW)*.[7]

26. In that sense a government lawyer should not ever be "pro" secrecy. The role requires rigor against your own application. Is this order necessary to protect the administration of justice? Has this information already been disclosed? Does this interfere in the proceedings too much to allow a fair hearing of the issues? What is the responsible result of the application for the rule of law?

27. It is important and useful for a government lawyer tasked with the responsibility for a public interest immunity claim to remember the perspectives from the other parties, media and the judicial officers responsible for ruling on the claim.

B.6 Protections must not prejudice the conduct of the hearing

28. It is a common misconception that an application to restrict information can prejudice the fair determination of legal proceedings. The applications to restrict government information discussed here do not have that effect. The mechanisms discussed here have two broad effects on the conduct of the proceedings:

    a. PII and parliamentary privilege claims prevent any use of the underlying material in the Court proceedings. Simply put, the Court cannot have regard to the underlying information in anyway in the course of determining the proceedings before it. If, for example, Police exclude a piece of evidence on a PII Claim, it cannot be used by either side.

    b. Non-publication, closed court and pseudonym orders operate differently. They allow the parties to use the information, but perhaps a witness' name might be changed. The underlying information or evidence may still to be used in the proceedings, but either the information cannot be released to the public, or some inconsequential detail might be changed so that any reporting of the case does not create the risk of harm. Such orders are often amended to make them more workable to the parties' conduct of the trial, even where the public might be excluded.

29. However, as mentioned above, the process of making the application to restrict the information itself may involve the Court accepting confidential submissions and evidence, often including the protected information itself and a description of why the release of that information would cause harm. Often to determine a PII claim, the Court may need to access the specific information that is sought to be protected, along with an explanation as to what harm would follow from the release of that information. Once the PII claim is resolved, that evidence is either in for all purposes or it is excluded entirely from the case.

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[7] Which states "*In deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.*"

30. In that way it is not dissimilar from a judge hearing evidence on a *voir dire* for the purposes of an objection, such as hearsay or opinion evidence, determining that the evidence is inadmissible, and proceeding to determine the case without regard to that inadmissible material.

31. There is a separate mechanism by which a decision maker can have regard to evidence that is not disclosed to the other party. There is a very limited jurisdiction within the sphere of review of security assessments in the Administrative Appeals Tribunal.[8] The process is specifically governed by statute and outside of the mechanisms discussed in this paper.

B.7 Exculpatory evidence must not be excluded

32. Apart from the general principle that the underlying proceedings must not be impaired, it is important to note the specific prohibition against excluding exculpatory evidence. Information that might exculpate an accused is worth special mention. Murphy J stated as *obiter* in *Alister v R* (1984) 154 CLR 404 at 431:

> *There is a public interest in certain official information remaining secret; but there is also public interest in the proper administration of criminal justice. The processes of criminal justice should not be distorted to prevent an accused from defending himself or herself properly. If the public interest demands that material capable of assisting an accused be withheld, then the proper course may be to abandon the prosecution or for the court to stay proceedings.* (emphasis added)

33. Brennan J also phrased the responsibility of the Court adjudicating a PII claim as an obligation to prevent a miscarriage of justice at 457.

> *… the Crown may show that on grounds of national security none of the applicants ought to have been given access to such relevant documents as could have been produced. However, in the last-mentioned case, it would be necessary for the Crown to go further. Even if access ought not to have been given to the accused, the documents ought to have been produced for inspection to the trial judge. He would then have seen whether justice would be done by permitting the trial to continue in ignorance of the contents of those documents.* (emphasis added).

34. Under the disclosure obligation at common law, the prosecution is obliged to disclose the contents of all material that may prove helpful to the defence: *R v Reardon (No.2)* (2004) 60 NSWLR 454 at [46].

[8] See sections 35, 35AA, 36, 36B, 37, 39A and 39B of the *Administrative Appeals Tribunal Act 1975 (Cth)*. Together these sections contemplate that, in the Security Appeals Division of the Administrative Appeals Tribunal, material relevant to the merits of a security assessment may be placed before the Tribunal without the applicant for review having access to that material.

35. According to the principle cited above from *Alister v R*, *if* exculpatory material must be withheld on PII grounds, an unfair trial cannot proceed. If the PII concern was so great as to prevent disclosure of exculpatory material to the accused, the prosecutor may be required to withdraw the prosecution, or the Court may order a stay. Prosecutors and law enforcement agencies rightly seek to avoid situations where a stay might be ordered.

36. In effect this establishes a stark choice for law enforcement agencies where exculpatory material could be subject to a PII claim: either leave an offence unprosecuted, or disclose the exculpatory material. There is no third way.

C PUBLIC INTEREST IMMUNITY

C.1 An objection to the release of government information

37. A PII claim is, in essence, an objection to producing or adducing material that might disclose information that would prejudice the ability of the state to continue to fulfil an essential function.

38. There are two key stages at which such a claim might be made:

    a. producing material under a compulsory mechanism such as a subpoena or under disclosure obligations; and

    b. adducing evidence in Court proceedings.

39. PII claims often arise in criminal proceedings, but can be found in all jurisdictions that deal with government information. It is useful to the parties as follows:

    a. PII claimants or applicants, being the state agencies that object to the use of the material; and

    b. PII respondents, being in large the private entities that are on the other side of the PII claim.

40. A PII claim is made when the PII claimant requests an order under either the common law or s.130 of the *Evidence Act 1995* that the particular information be withheld from disclosure or admission into evidence.[9]

41. PII can also be a ground for withholding material from a Freedom of Information (**FOI**) request.[10] As with most if not all decisions on FOI requests, such grounds can be examined on merits review, both internally and in the Administrative

[9] Where the prosecution gives the requisite notice in a Federal criminal proceeding, invoking the application of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (**the NSI Act**), and the sensitive information relates to matters of national security, certain statutory applications under that legislation also replicate the effect of a public interest immunity claim.

[10] See for example, exceptions to production of documents addressed in sections 33 to 38 and 47B to 47E of the *Freedom of Information Act 1982 (Cth)*.

Appeals Tribunal (**AAT**).[11] In NSW the mechanism is replicated under the *Government Information (Public Access) Act 2009 (NSW)* (**GIPA**), external merit review lies with the NSW Civil and Administrative Tribunal (**NCAT**).[12]

42. Other than the fact that the process is outlined by statute rather than common law, the process adopted in either the AAT and NCAT is very similar to a PII claim in the course of general litigation in state and federal Courts. As such, I do not propose to deal further with PII in FOI or GIPA decisions. I will focus instead on PII claims as they arise in existing judicial proceedings.

C.2 How does PII operate?

43. A successful PII claim operates to relieve a government agency from disclosing particular government information through normal Court processes such as an order to produce or a question put to a witness during oral evidence.

44. Such relief is generally tied to specific information, such as the particular contents of a document, or a specific question that is put to a witness.

45. PII does not generally attach to the class of the document that contains that information. However cabinet-in-confidence documents provide one example of a 'class' of documents where the nature of the consideration by cabinet would have the result that it would be rare, if ever, for the interest in disclosure to outweigh the public interest in confidentiality. Even in that example, it may be necessary for the Court to have regard to the specific contents of the particular documents that are sought in order to determine whether the documents are crucial for the proceedings or otherwise resolve the question of immunity: *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

46. In practice, the relief takes the form of an order of the Court that has the effect that certain information may be withheld from production or admission into evidence. Some examples of such orders are:

    a. A set of orders including:

        i. A declaration that the Court is satisfied that the public interest in preserving confidentiality of the documents provided to the Court by way of confidential exhibit outweighs the interest in either disclosing the information or admitting the document into evidence in the proceedings;

        ii. An order that the documents in the confidential exhibit are not to be disclosed in the proceedings or admitted into evidence; and

[11] See Part VIIA of the *Freedom of Information Act 1982 (Cth).* Such decisions can potentially come under judicial review in the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977 (Cth).*

[12] See for example, s.107 of the *Government Information (Public Access) Act 2009 (NSW).*

iii. An order that the confidential exhibit is to be returned to the PII applicant;

b. An order that the subpoena that calls for production of PII material be set aside;

c. A ruling on evidence that the specific question of a witness that would reveal sensitive information is not allowed.

47. These orders operate to prevent the disclosure of the sensitive information, so that the information remains confidential.

48. As noted above, the confidential information cannot be used by either side. Such material cannot be adduced into evidence in the hearing or relied on by the Court in adjudicating the dispute or disputes before the Court. To do so would be unjust, and would constitute a reliance on secret evidence that is abhorrent to the exercise of federal judicial power within the Australian legal system.[13]

49. In the course of ruling on a PII claim the particular information that is subject to the claim for protection may be disclosed to the judicial officer. However, that judicial officer is prevented from having regard to that information for the purposes of any findings of fact in the underlying proceedings. If a PII respondent considers that the access to the PII information will prejudice the judicial officer in determining the underlying proceedings, the normal rules for judicial recusal would apply.[14]

C.3 Assessing the use of information and the rise of special counsel

50. As noted above, it is a fundamental rule that exculpatory evidence cannot be excluded in criminal proceedings. To do otherwise may effectively engage the state in a perversion of justice. However, in practice it is not always clear or easy to determine whether particular information is exculpatory or not.

51. Both the prosecution and the law enforcement agency are often in a poor position to anticipate the defence case that will be led. Without that insight into the defence, the material that could be exculpatory evidence on a particular issue may seem innocuous to the agency seeking to withhold or otherwise protect it.

52. It is for this reason that statements of legitimate forensic purpose are crucial in assessing a public interest immunity claim. Such statements of purpose are often the only insight into the way in which the material should be assessed as

[13] See for example *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, per McHugh J at [116].

[14] As noted above, the application would be to the effect that the trial judge was so prejudiced by having access to inadmissible evidence that the judge could not fulfill their proper function in the conduct of the trial. It would be an onerous application to make and there would be a strong presumption against such an application succeeding.

to whether it might be exculpatory and therefore subject to the disclosure obligation.

53. In the most difficult cases both the reason for confidentiality and he interest in disclosure is high. The accused may be at a forensic disadvantage for lack of access to the material. In these difficult cases the question of the use of a special advocate can arise. The use of a special counsel or advocate is practiced in the UK, but developing momentum in Australia, and particularly in New South Wales.

54. The special advocate is a barrister that holds a security clearance and is approved to access sensitive government information. That person takes instructions from the accused on the likely defence, and is then provided access to the sensitive material in dispute. Once they receive access to the material, they are never again able to take instructions from the accused. To do so would risk disclosure of the sensitive material. However, the special advocate is able to inspect the sensitive material and take part in the debate on whether it should be disclosed during the determination of the *voir dire* on the PII claim.

55. The mechanism is available, but not widely used in Australia. In *R v Lodhi* [2006] NSWSC 586, Whealy J held that that process was available in Australia under the common law, but there was no need for it to be ordered in that case at that particular stage. In *Commissioner of Police v Sleiman & AVS Group of Companies Pty Ltd & Ors* [2011] NSWCA 21 the NSW Court of Appeal considered whether the procedure was available in the Administrative Decisions Tribunal when considering criminal intelligence for the purposes of security license application under the *Security Industry Act 1997 (NSW)*.[15] In *State of New South Wales v Public Transport Ticketing Corporation (No 3)* [2011] NSWCA 200, Alsop P (as his Honour then was), with whom Hodgson JA and Sackville AJA agreed, held that the mechanism was available, that it could operate in civil proceedings consistent with the overriding purpose under the *Civil Procedure Act 2005 (NSW),* and made orders implementing such the use of the special advocate in the proceedings before the Court.

C.4 Practical tips for the start of a PII claim

C.4.1 Identify the claim

56. Before asserting and contesting PII, the claim must be identified with some precision. This process will determine how you assert the claim and establish it, if necessary. A lawyer briefed on a PII claim should work together with the client agency to answer the following questions before any assertion of the PII claim:

    a. What mechanism requires the information to be disclosed?

[15] The ADT had the power to appoint a special counsel generally, but a specific provision of the *Security Industry Act 1997 (NSW)* prevented disclosure of the criminal intelligence at issue in these proceedings without the consent of the Commissioner of Police. Therefore, in that case, though the mechanism was otherwise available, it could not be engaged without the consent of the Commissioner.

b. What exactly is the sensitive information that is at risk?

c. Why would it be bad if the sensitive information would be released?

d. Has there been any prior disclosure of any part of the sensitive information that needs to be taken into account?

e. Why is it that the sensitive information could be relevant to the party seeking the information?

f. What exactly can be said about the claim? Can the existence of the claim be divulged or is that sensitive as well?

g. Is there any room for discussion with the other side?

C.4.2 The importance of negotiation

57. The possibility of room for discussion with the other side is often the most important inquiry that can be made at an early stage. A great number of PII claims are resolved through careful negotiation.

58. To give an example, of the approximately 87 subpoenas issued to Commonwealth agencies in the *R v Elomar* terrorism prosecution, the majority involved some public interest immunity concerns. Only two PII claims involving the Commonwealth agencies proceeded to a final judgement, in a matter of approximately 100 pre-trial decisions.[16] During the trial there were extensive closed-Court sessions, classified evidence, and evidence from ASIO officers. A great number of the subpoenas that were issued touched upon this sensitive material. Accordingly, the public interest and national security issues were ever present as the trial was conducted, but these issues did not require repeated contested applications to be resolved by a decision from the Court.

59. PII issues that arise under subpoenas are often able to be resolved with careful discussion and negotiation with the representatives for the accused. Most often, sensitive information can be redacted from the documents sought without any prejudice to or challenge from the accused. The accused's interest is likely to be in establishing what did or did not occur, what was or wasn't seen or observed, not in matters of sensitivity about a surveillance methodology used, or the true identity of a surveillance officer giving evidence under a pseudonym.

60. Experience suggests that defence lawyers often are reluctant to provoke a PII contest unless they must. Apart from the disruption to the proceedings, defence representatives may face a one-sided contest before the trial judge, dominated by confidential exhibits and submissions. Assuming that the judge can disregard any prejudicial effect of the confidential evidence that the Court might receive in the course of such a contest, there is still the potential of a loss of

[16] *R v Baladjam & Ors (No.31)* [2008] NSWSC 1453; *R v Baladjam & Ors (No.60)* (Unreported, NSWSC Whealy J, 17 November 2008)

momentum in choosing a fight on a side issue where it may be difficult for a PII respondent to win. Unless there are clear instructions to the contrary, a PII fight poses a forensic risk for a PII respondent, often with little prospect of gain.

C.4.3 Identify your PII sponsor

61. It is also useful to identify your PII sponsor at an early stage. A PII sponsor is the senior official that is likely to be the deponent on any affidavit supporting the PII claim.

62. The legal team may never meet that PII sponsor, but it is useful to confirm that the instructing officer from the client agency has identified the person that they will need to draw on.

63. Necessarily a PII claim involves statements of how particular sensitive information interacts with the overarching operational concerns of a government agency to fulfil its function. The legal team should have a clear avenue to the governing structure or executive management of the organisation at the outset of dealing with the claim. The PII sponsor is that link to the executive.

64. As a practical matter, it can be useful to know in advance if the PII sponsor has particular commitments or concerns that need to be addressed within tight timeframes, to have as much advance notice as possible.

65. Some of the older cases refer to the relevant Minister being an appropriate deponent for a PII claim. Most modern PII claims involve the relevant Agency Head or their direct Deputies and delegates. Even if line area managers also provide evidence, such as on the specific detail of the sensitive material in issue, it is useful for this senior PII sponsor at the Agency Head or Deputy level to speak as to the overall operational concerns of the particular agency and the manner in which the sensitive material interacts with those concerns.

C.5 Making the PII Claim: two processes

66. As noted above a PII claim can arise most often as either:

    a. an objection to production under compulsory mechanisms such as a subpoena or disclosure requirement; or

    b. an objection to that admission of evidence, for example:

        i. a question of an officer of the state (or someone who holds confidential government information) where that question might require the witness to disclose that information in evidence in the hearing; or

        ii. the tender of a document where that document records matters of particular sensitivity.

67. Procedurally the two circumstances are quite different. The legal basis and tests applied remain relatively constant.

C.6 Production under compulsory mechanisms

C.6.1 Subpoenas and Legitimate Forensic Purpose

68. Once PII issues in response to a subpoena arise and are identified, it is nearly always useful to send a letter that requests a statement of the legitimate forensic purpose (**LFP**) for which the material described in the subpoena is sought. Recent decisions that have perhaps widened the scope of what might constitute a valid LFP, such as *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 (***Blacktown City Council***), have not removed the requirement that a statement of LFP be provided by the party issuing a subpoena.

69. This correspondence seeking a statement of LFP is crucial for the following reasons:

    a. A subpoena that does not have a LFP is an abuse of process and must be struck out: *R v Tastan* (1994) 75 A Crim R 498 at 508.

    b. As already mentioned, a PII contest is a balancing exercise. The Court is balancing the public interest in the confidentiality of the information against the reason for which the material is needed in the Court proceedings, that is the LFP. A statement of LFP helps to identify the precise interests that are being weighed against each other.

    c. A statement of LFP often divulges what the accused is interested in. This is not useful for any improper anticipation of the defence on behalf of the prosecution, but for identifying where there may be room for negotiation to accommodate both the LFP and the PII concerns without the need for the intervention of the Court in a contested process. In this way a request for a statement of LFP can be the opening of a negotiation that resolves the issue; through anything from withdrawal of the subpoena in its entirety to an answer for a completely rephrased category of documents that captures what is needed without revealing matters of PII.

    d. If the issues cannot be resolved, it is likely that the attempts to obtain a statement of LFP will become exhibit 1 to any affidavit seeking to set the subpoena aside. It is always a good idea to presume that every piece of correspondence may end up before a judge contemplating an application of one form or another, but a request for LFP in a PII claim is often made with this specific purpose in mind.

70. In some cases you may not be able to foreshadow that there are PII concerns without risking disclosing the information that you seek to protect. In those cases, since a statement of LFP is a requirement for the validity of the

subpoena, a request for a statement of LFP should be able to be made without disclosing any sensitive information.

71. Presuming that the request for a statement of LFP, or any subsequent negotiation does not resolve the issue, the next step will be for the recipient of the subpoena to apply to the Court for relief from that aspect of the subpoena that would require production of the sensitive material. The PII claimant will formulate the orders that it might seek in a notice of motion filed in relation to the subpoena. The requirements for such a contested hearing on the issue are discussed from paragraph [85] below.

C.6.2 The Disclosure Obligation in criminal proceedings

C.6.2.1 Disclosure in New South Wales

72. When operating within the NSW jurisdiction, section 15A of the *Director of Public Prosecutions Act 1986 (NSW)* is of central importance and states:

> ***15A Disclosures by law enforcement officers***
>
> *(1) Law enforcement officers investigating alleged offences have a duty to disclose to the Director all relevant information, documents or other things obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the case for the accused person.*
>
> *(1A) The duty of disclosure arises only if the Director exercises any function under this Act or Part 2 of Chapter 3 of the Criminal Procedure Act 1986 with respect to the prosecution of the offence (including in connection with a law enforcement officer seeking advice from the Director under section 14A of the Criminal Procedure Act 1986 about the commencement of proceedings for an offence).*
>
> *(2) The duty of disclosure continues until one of the following happens:*
> *(a) the Director decides that the accused person will not be prosecuted for the alleged offence,*
> *(b) the prosecution is terminated,*
> *(c) the accused person is convicted or acquitted.*
>
> *(3) Law enforcement officers investigating alleged offences also have a duty to retain any such documents or other things for so long as the duty to disclose them continues under this section. This subsection does not affect any other legal obligation with respect to the possession of the documents or other things.*
>
> *(4) The regulations may make provision for or with respect to the duties of law enforcement officers under this section, including for or with respect to:*

(a) the recording of any such information, documents or other things, and
(b) verification of compliance with any such duty.

(5) The duty imposed by this section is in addition to any other duties of law enforcement officers in connection with the investigation and prosecution of offences.

(6) The duty imposed by this section does not require law enforcement officers to provide to the Director any information, documents or other things:
(a) that are the subject of a claim of privilege, public interest immunity or statutory immunity, or
(b) that would contravene a statutory publication restriction if so provided.

(7) The duty of a law enforcement officer in such a case is to inform the Director of:
(a) the existence of any information, document or other thing of that kind, and
(b) the nature of that information, document or other thing and the claim or publication restriction relating to it.
However, a law enforcement officer must provide to the Director any information, document or other thing of that kind if the Director requests it to be provided.

(8) (Repealed)

(9) In this section:

*l**aw enforcement officer** means a police officer, or a member of staff of one of the following agencies, who is responsible for an investigation into a matter that involves the suspected commission of an alleged offence:*
(a) the Law Enforcement Conduct Commission,
(b) the New South Wales Crime Commission,
(c) the Independent Commission Against Corruption.

***statutory publication restriction** means a prohibition or restriction on publication that is imposed by or under:*
(a) section 176 (Disclosure and use of examination material) or 177 (Disclosure and use of evidence given at examination) of the Law Enforcement Conduct Commission Act 2016, or
(b) section 45 or 45A of the Crime Commission Act 2012, or
(c) section 112 of the Independent Commission Against Corruption Act 1988.

73. Under this section, the role of law enforcement officers in considering PII material that might otherwise be disclosed is to inform the DPP of the existence

of the PII material and describe the nature of that material. The DPP may then request that a copy of the PII material be provided to the DPP. If the DPP does so, the officer must comply with the request unless the officer is prevented from doing so by the operation of the specific sections of the *Police Integrity Commission Act 1996*, the *Crime Commission Act 2012*, or the *Independent Commission Against Corruption Act 1988*.

74. Section 15A provides for the disclosure of information to the DPP and is silent on the next step of disclosure of such material to the accused. Once the material is in the hands of the DPP the common law principles of disclosure apply. That is, the prosecution is obliged to disclose the contents of all material that may prove helpful to the defence: *R v Reardon (No.2)* (2004) 60 NSWLR 454 at [46]. The DPP has a duty to independently assess public interest immunity concerns to determine whether such material should be disclosed to the accused. Where the DPP does withhold information on the basis of PII concerns, that decision is not determinative, the Court is the only body that could make a final determination on the validity of the PII claim: *R v Lipton* (2011) 82 NSWLR 123, per McColl JA at [110] to [111].

C.6.2.1 Commonwealth disclosure regime

75. The Commonwealth DPP (**CDPP**) is also subject to the common law obligations of disclosure, but has also set out a policy on disclosure pursuant to s.11 of the *Director of Public Prosecutions Act 1983 (Cth)*. The CDPP's Statement on Disclosure[17] states

> 3. Subject to any claim of public interest immunity, legal professional privilege, or any statutory provision to the contrary, in prosecutions conducted by the Commonwealth, the prosecution must, in accordance with this Statement:
>   a. first, fulfil any applicable local statutory obligations relating to disclosure; and
>   b. second, if not already required by the applicable state or territory provisions, also disclose to the accused, any material which:
>   (i) can be seen on a sensible appraisal by the prosecution to run counter to the prosecution case (i.e. points away from the accused having committed the offence); or
>   (ii) might reasonably be expected to assist the accused to advance a defence; or
>   (iii) might reasonably be expected to undermine the credibility or reliability of a material prosecution witness.

76. On the issue of withholding material from disclosure on the basis of PII, the Statement on Disclosure states:

[17] Last updated on March 2017, accessed at https://www.cdpp.gov.au/sites/default/files/Disclosure%20Statement-March-2017_0.pdf on 7 July 2022.

Material withheld from disclosure

23. Where material has been withheld from disclosure as:
    a. it is considered that the material is immune from disclosure on public interest grounds; or
    b. disclosure of the material is precluded by statute; or
    c. it is considered that legal professional privilege should be claimed in respect of the material;

    the defence should ordinarily be informed of this. In most cases it should be possible to provide some general information as to the nature of the material concerned. The extent of any further information will be determined by reference to the particular matter, but as a general rule information about the nature of the claim should be provided unless it will compromise that claim (e.g. the fact of there being an informer claim is not usually disclosed). Notification of the existence of such material may in some circumstances generate the issuing of a subpoena.

24. If the existence of material that otherwise meets the requirements for disclosure as set out in Part 1 of this Statement cannot be disclosed at all pursuant to paragraph 23, or where a claim for immunity has been upheld by a court, then consideration will need to be given as to whether it is fair for the prosecution to proceed or continue in the absence of such disclosure. In some circumstances a prosecution may not be able to proceed and may need to be discontinued.

77. This policy averts to the practical fact that, for a PII contest to arise in relation to material withheld from disclosure, the accused must have notice that some material has been withheld on the basis of PII concerns to then decide whether to test that claim. The two primary mechanisms for testing the claim are either by issuing a subpoena for the information or by applying for orders compelling production of the material.

78. Either mechanism provides a forum for a contested PII claim that would consider the underlying material and whether it should be disclosed. Either the PII claimant or respondent will be applying for some form of order in a notice of motion that would resolve the question of whether the information should be produced or not.

79. Paragraph 24 of the Statement on Disclosure reflects the requirements of the common law as per *Alister v R* (1984) 154 CLR 404 as referred to at paragraphs [32] to [36] above.

C.7 Objections during evidence

80. Anyone can make an objection to a question of a witness on the basis of PII concerns: the witness; the Prosecution; any agency of the state seeking to

appear separately to be heard on the issue; the Court acting of its own volition; or even the party that might typically be regarded as a PII respondent, such as the representative for the accused in a criminal matter.[18]

81. In practice the Prosecution often fulfils this role for matters that arise at short notice. In many instances, where there is sufficient advance notice of the risk of sensitive material arising in the proceedings, it is useful for the state agency making or endorsing the PII claim to seek to be separately represented to make the appropriate objection.

82. The precise mechanism is simply for the relevant advocate to state "*I object*", and then to explain that the objection is made on the basis public interest immunity, under section 130 of the *Evidence Act 1995* or under the common law. Submissions may then develop the contention that the interest in disclosing the information is outweighed by the public interest in the confidentiality of the document.

83. In the case of an objection to the question to a witness or the tender of a document in evidence, there may not be a need to formulate the precise order that the PII claimant or respondent is seeking from the Court in a notice of motion. It is either to allow or disallow the question put to the witness, or the tender of the document.

84. However determining a PII claim in relation to oral evidence may still require all of the same sort of material as an application to set aside a subpoena. In particular the open and closed submissions and affidavits are often essential.[19]

C.8 Contesting PII: materials required in support of the PII claim

85. The materials that may be required from the PII claimant for the purposes of determining a contested PII claim can include:

    a. In the case of an argument under subpoena or disclosure requirements, a notice of motion setting out the precise order that is sought;

    b. An "open" affidavit in support of the notice of motion or objection that can be served on the other side that attaches relevant correspondence concerning legitimate forensic purpose and sets out any relevant

[18] See s.130(2) *Evidence Act:* the Court may give a direction to exclude evidence on the basis of public interest "*either on its own initiative or on the application of any person (whether or not the person is a party)*". It is not unheard of in judge alone hearings for defence advocates to flag the issue before asking a question to which s.130 may apply so as to allow the objection to be taken and the issue resolved accordingly to law in the most appropriate manner: "This question may provoke a PII objection, so take your time to allow that issue to be resolved before you answer if necessary, but the question that I want to ask is…"

[19] In the case of an *ad hoc* objection to evidence, in some circumstances it is possible to anticipate the sensitive issues that may arise and have prepared and executed an affidavit that covers the topics in sufficient detail to deal with evidence objections as they arise. In other circumstances an adjournment may be required to allow the agency to get the requisite evidence prepared.

evidentiary matters that can be addressed openly inter parties without disclosing the PII material that is ought to be protected;

c. A "closed" affidavit to become a confidential exhibit on the application;

d. A written outline of "open" submissions that can be provided to the other side and the Court;

e. A written outline of "closed" submissions that will be provided to the judge alone.

f. A confidential packet, most likely as an annexure to the closed or confidential affidavit, that contains the relevant documents that are to be withheld from disclosure to the PII respondent. Again, this is to be a confidential exhibit that may be inspected by the trial judge, but is not to be accessed by the PII Respondent subject to any final order of the Court rejecting the claim for PII.

C.8.1 Affidavits in support of the PII claim

86. The affidavits that are to be prepared must also be quite detailed and given by senior officials within the relevant agency. As an example, for the NSW Police it is useful to have a deponent at the level of Assistant Commissioner of Police. In sensitive matters the open affidavit may be necessarily short. However the obligation on the PII claimant is a heavy one. Ideally an affidavit in support of a PII claim will include the following:

a. Senior deponent;

b. Paragraph 2 would state clearly who could access the affidavit and the underlying material. The open affidavit could state for example:

> *"This is an open affidavit and may be provided to the accused and his/her representatives. I also make another affidavit in these proceedings of today's date. That affidavit deals with information that would tend to reveal the precise nature of the information that is to be protected by the claim for public interest immunity. I request that that affidavit and its annexures be treated in confidence by the Court and be kept only for the presiding judge and my representatives in Court for the purposes of this claim. If detailed oral submissions are required in relation to that material I request that such discussion take place in closed Court, in the absence of the accused and his/her representatives."*

c. The basis of the making of the affidavit. That is own knowledge, instructions from the relevant line areas, documents referred to in the affidavit, consideration of the underlying material and so on as relevant;

d. The background and qualification of the deponent. The deponent is essentially providing opinion evidence to the Court. As such it is useful to consider them as being similar to an expert. Their background, qualifications and role within the agency claiming PII is a crucial element of the evidence that the deponent provides;

e. The body of the affidavit should commence the task of explaining the overall functions of the agency, how the material subject to the claim fits in, and the specific harm that is, in the opinion of the deponent, likely to result from the disclosure of that information.

87. In relation to the level of detail that is required to deal with the specifics of the information and the harm that will result from disclosure of it, the High Court has stated that precision is required. Generalised statements are likely to be rejected: *Sankey v Whitlam* (1978) 142 CLR 1 per Mason J at 96-97:

> *"To evaluate this submission it is necessary to identify, first, the various elements which sustain the public interest against production of documents of the kind referred to. In identifying these elements I have gained little assistance from the affidavits sworn by Ministers and heads of departments in support of the objection to production. They have sought refuge in the amorphous statement that non-disclosure is necessary for the proper functioning of the Executive Government and of the public service, without saying why disclosure would be detrimental to their functions, except for the reference to want of candour. Perhaps affidavits in this form were acceptable in the days when it was thought that the court should uphold an objection once made by the Crown through its appropriate representative. But they are plainly unacceptable now that the court is to resolve the issue for itself, after an inspection of the documents when that is thought to be appropriate. An affidavit claiming Crown privilege should state with precision the grounds on which it is contended that documents or information should not be disclosed so as to enable the court to evaluate the competing interests. The affidavits in this case fall far short of this standard and I must therefore look beyond them for the considerations which tend to support non-production."* (emphasis added)

88. As mentioned at above, Courts have previously considered whether the PII claim is made in relation to a class of documents or the specific contents of the particular documents that are sought to be withheld from production: phrased as either a "*class claim*" or a "*contents claim*".

89. In practice, the requirement of precision as espoused in *Sankey v Whitlam* means that it is extremely rare for "*class claims*" to be made. While the number of documents that are sought to be withheld may be great in number, or even have common features, it is clear that the deponent on a PII claim must grapple

with the specific contents of the documents and the detailed reasons against disclosure.[20]

C.8.2 Time to prepare

90. Preparing such detailed material obviously takes time. The Courts have recognised that a PII claimant will need some time to prepare and run a PII claim and, if necessary, explore avenues of appeal in the case of an order requiring disclosure: *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 43:

> *"In view of the danger to which the indiscriminate disclosure of documents of this class might give rise, it is desirable that the government concerned, Commonwealth or State, should have an opportunity to intervene and be heard before any order for disclosure is made. Moreover no such order should be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so."*

91. It is an appealable error for a Court to require disclosure of the information under a PII claim before either the PII claimant has had an opportunity to adduce evidence in support of the claim or, in the event of an order requiring disclosure of the sensitive material, testing that order on appeal: *R v Fandakis (No.2)* [2002] NSWCCA 5.[21]

92. In practice, a PII claimant is still making an intervention or interruption into an ongoing proceeding. While the authorities are clear that some time should be granted to allow the state agency to prepare the claim, it is clear that the time must be "*reasonable*", whatever that might mean in the context of a particular trial. As is often the case with state agencies, the Court and PII respondents often expect such agencies to have limitless resources of the State at their disposal. PII claimants should act quickly.

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[20] In *Matthews v SPI Electricity Pty Ltd & Ors (No.11)* [2014] VSC 65 Derham AsJ stated at [24](c) that documents could be immune from disclosure on the basis of their class, because disclosure of that class of document may injure the public interest irrespective of the content of the documents. However Derham AsJ also proceeded to determine the matter on the basis of an examination of the contents of the particular documents at issue in those proceedings and found, at [73], that those documents were not relevant to the issues in the underlying proceedings. It appears that even where a "class" claim is recognised it is still useful to have regard to the "contents" based approach.

[21] In *Fandakis (No.2)* an objection to a question put to a witness under s.130 of the Evidence Act was overruled by the presiding Magistrate. The NSW Court of Criminal Appeal granted the appeal and held that the Magistrate was in error in:

- the ruling on the objection;
- the refusal to adjourn to allow the PII claimant to adduce evidence in support of the PII claim;
- the refusal to delay the disclosure of the information so that the ruling could be tested on appeal.

C.9 The role of the PII respondent

93. For the PII respondent, it may often seem as though there is very little that can be done. The nature of the PII contest dealing with confidential exhibits and submissions is often necessarily one sided. However meaningful steps that can and should be made by PII respondents include:

    a. A detailed statement of LFP or why the material sought for production or to be adduced into evidence is important for the trial. Without this statement, a meaningful balancing exercise cannot occur. As stated above, such a statement may yet identify a middle ground where the respondent's interest in establishing a point in the underlying proceedings and the PII claimant's interest in the confidentiality of the material can be both accommodated;

    b. Submissions drawing on the various authorities emphasising the heavy onus that is placed on the PII claimant seeking to establish the claim;

    c. As much scrutiny and assistance as can be managed in relation to assessing and testing the propositions of any "*open*" affidavit and submissions.

94. The participation of the PII respondent can be very useful to the Court and, perhaps counter-intuitively, to the PII claimant. The extent to which a PII respondent can participate can relieve the PII claimant of an obligation to anticipate those interests in the weighing exercise. A fairly stated case on both sides is of therefore of great benefit to both of those parties and the Court.

C.10 The nature of the hearing of a PII Claim

95. Identifying the nature of the proceeding can be important to identify the appropriate evidentiary standard of proof and the potential rights of appeal in relation to any final orders made concerning the production of material or the admission into evidence.

96. There has been some controversy in particular over whether a decision on a PII claim is interlocutory in nature or finally disposes of the subject matter of a separate chose in action. Concerns as to the standard of proof most often arise when the underlying proceedings in which the PII claim is made is a criminal case.

97. The better view is that a PII contest is always an interlocutory hearing where the Court is required to be satisfied on any relevant matters according to the civil standard of proof, the balance of probabilities.

C.10.1 Interlocutory hearing

98. Subpoena or disclosure (or even discovery) decisions are typically regarded as interlocutory decisions. Decisions whether to adduce evidence are also interlocutory in nature, that is a ruling within the context of a larger proceeding.

99. In relation to criminal proceedings, *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536, the NSW Court of Criminal Appeal held that an argument in relation to a subpoena was an interlocutory decision by the Court and, as such, in the context of a criminal case the avenues of appeal were determined by section 5F of the *Criminal Appeal Act 1912 (NSW)*. That is, the Attorney-General or the DPP may appeal as of right under s.5F(2), and any other party may appeal with leave under s.5F(3).

100. In civil matters, the general rule is that the right to appeal attaches to the making of an order of the Court. An order to disclose sensitive information would have a final determinative effect on the PII claim. For that reason, across the various jurisdictions, whether leave is required to appeal or not, and in light of the strong statement concerning the right to explore an appeal in *Sankey v Whitlam,* Courts have been able to identify an appropriate avenue of appeal and to have the matter resolved through ordinary appellate processes.

C.10.2 Civil standard of proof

101. The issue of standard of proof is clearest when considered in the case of a PII contest concerning the admissibility of evidence. The applicable burden of proof is determined by s.142 of the *Evidence Act 1995* and is the civil standard.

102. The application of the civil standard of proof is subject to the requirements of s.140(2) of the *Evidence Act 1995*, being the modern statutory basis for the common law rule in *Briginshaw*.[22] The Court may consider the nature of the dispute, the subject matter of the proceedings, and the gravity of the matters alleged in deciding whether it is satisfied of the required findings of fact on the balance of probabilities.

C.10.3 Ability to cross examine PII deponents

103. Usually, any deponent must execute an affidavit on the basis that they could be cross-examined on it. However, in the case of a PII claim, it is extremely unusual for the deponent of an affidavit made in support of the claim to be subject to cross-examination on that material. In *Young v Quin* (1985) 59 ALR 225 at per Bowen CJ at 228:

> *"It would be a very rare case indeed where the Court would permit cross examination of a deponent or would allow countervailing evidence, although I am not prepared to say that the Court could not allow it."*

[22] *Briginshaw v Briginshaw* (1938) 60 CLR 336.

104. In fact Courts have allowed such cross-examination to occur. In *Zarro v ASC* (1992) 34 FCR 427, Drummond J allowed the deponent on an affidavit, a Mr Adams, to be cross-examined because his Honour held "*concerns at what had emerged with respect to the way the Commission had gone about claiming immunity and because of concerns at the reliability of Mr Adams' final claim to immunity for certain of the documents, in view of the change of ground, and in view of all three affidavits."* This approach was neither the subject of an appeal nor criticised by the Full Federal Court in *Zarro v ASC* (1992) 36 FCR 40.

105. One of the reasons for such a process being adopted rarely is for the risk that the cross-examination might reveal matters that would be the subject of the claim for public interest immunity. The other is the nature of the matters deposed to as to the operational concerns of a state agency. What would be the basis for the Deputy Commissioner of Police to be cross-examined as to the importance of human informers to the work of the Police in the community? Is that a proposition that is capable of being tested by cross-examination or submission?

106. In the absence of cross-examination, the primary risk for a PII claimant is that the Court refuses the PII claim on the basis that the judge has not been persuaded by the affidavit material. When this occurs it is not unusual for the judge to have regard to the sensitive material themselves, unassisted by the analysis that has been provided by the PII sponsor. Most often, the reason that judges have cited for such an approach is the lack of precision or detail in the affidavit's treatment of the specific information that is sought to be protected, and the real risk of harm that is likely to arise.

107. For this reason, it is preferable for an affidavit to err on the side of caution and risk overdoing it, giving too much detail, rather than risk the claim by giving too little detail or analysis in the affidavit.

C.11 The legal test for PII

108. It is useful to discuss the test at two separate stages, adducing evidence and pre-trial production of material.

109. As stated above, when adducing evidence, s.130 of the *Evidence Act 1995* establishes the relevant test, and this section is considered in further detail below.

110. In relation to production of the material prior to its admission into evidence, there is a difference in position between the NSW and Commonwealth versions of the *Evidence Act 1995*.[23]

111. Under s.131A of the *Evidence Act 1995 (NSW)*, s.130 is also the applicable test for determining a request to be exempt from a court process requiring disclosure of the relevant information for all of the various categories of PII.

[23] The *Evidence Act 1995 (Vic)* is not identical to the NSW Act, but does follow the more expansive approach to the various heads of PII that might be claimed.

112. At the Commonwealth level, pursuant to s.131A of the *Evidence Act 1995 (Cth)*, s.130 only applies where the information would disclose the identity of an informant.

113. This difference does not often arise in criminal proceedings. Under s.4 of the *Evidence Act 1995 (Cth)*, that Act, and that version of s.131A, applies in proceedings in a federal court (including the High Court, the Federal Court, the Family Court and the Federal Circuit Court), or the Courts of the Australian Capital Territory.

114. In all matters in NSW Courts, even where a NSW Court is hearing a Commonwealth offence, the *Evidence Act 1995 (NSW)* applies as a result of s.68 of the *Judiciary Act 1903 (Cth)*. Commonwealth criminal matters that take place in NSW are nearly exclusively dealt with within NSW Courts, and therefore under the *Evidence Act 1995 (NSW)*.

115. Where there are "gaps" in this coverage provided by s.131A to pre-trial disclosure, the common law continues to apply: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [17]-[28] and [64]. The common law is also relevant to and informs the application of s.130.

116. It is useful then to consider the position under both s.130 and the common law in turn.

C.11.1 Section 130 of the Evidence Act

117. Section 130 of the *Evidence Act 1995* is crucial to an objection to the admission of evidence. As set out above, pursuant to s.131A of the *Evidence Act* it is also often relevant to the determination of objections to pre-trial disclosure. Section 130 states:

> ***130 Exclusion of evidence of matters of state***
>
> *(1) If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.*
>
> *(2) The court may give such a direction either on its own initiative or on the application of any person (whether or not the person is a party).*
>
> *(3) In deciding whether to give such a direction, the court may inform itself in any way it thinks fit.*
>
> *(4) Without limiting the circumstances in which information or a document may be taken for the purposes of subsection (1) to relate to matters of state, the information or document is taken for the*

purposes of that subsection to relate to matters of state if adducing it as evidence would:

(a) prejudice the security, defence or international relations of Australia; or

(b) damage relations between the Commonwealth and a State or between 2 or more States; or

(c) prejudice the prevention, investigation or prosecution of an offence; or

(d) prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law; or

(e) disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State; or

(f) prejudice the proper functioning of the government of the Commonwealth or a State.

(5) Without limiting the matters that the court may take into account for the purposes of subsection (1), it is to take into account the following matters:

(a) the importance of the information or the document in the proceeding;

(b) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;

(c) the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;

(d) the likely effect of adducing evidence of the information or document, and the means available to limit its publication;

(e) whether the substance of the information or document has already been published;

(f) if the proceeding is a criminal proceeding and the party seeking to adduce evidence of the information or document is a defendant—whether the direction is to be made subject to the condition that the prosecution be stayed.

(6) A reference in this section to a State includes a reference to a Territory.

118. The Australian Law Reform Commission, in recommending the codification of law in the *Evidence Act*, specifically stated that:

    a. Research had not identified any deficiencies in the current common law approach; and

    b. The proposal was to interfere as little as possible with the common law developments in the area.[24]

119. Consideration of s.130 has been informed by discussions of the common law test such as *Alister* and *Sankey v Whitlam*: see for example *Eastman v The Queen* (1997) 76 FCR 9.

C.11.2 The Common Law test for PII

120. As stated above, pursuant to the various formulations of s.131A, section 130 may also be relevant to determining a PII claim at the stage of producing information to the Court and the parties. The coverage of s.131A is not perfect however, and even where s.130 is invoked, Court may have regard to the common law in resolving PII claims.

121. The common law principles are clear. Production will not be required of documents, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose them: *Sankey v Whitlam* (1978) 142 CLR 1 at 38 per Gibbs CJ.

122. Put another way, the relevant question is:

> *"...would the public interest be best served and least injured...by compelling or by refusing to compel disclosure to the Court of the information and of the documents sought by the subpoena?": Alister v The Queen* (1984) 154 CLR 404 at 453 per Brennan J.

123. In both of these cases it was recognised that, when such an issue arises, the Court is required to consider two conflicting aspects of public interest, those being (1) harm done by the production of the documents as against (2) a consideration of the fair and efficient administration of justice: See *Alister* (at 412) per Gibbs CJ.

C.12 Types of content that may give rise to a PII claim

124. The Courts, and Parliament when considering the *Evidence Act*, have deliberately chosen not to prescriptively list the types of content that may give

[24] See extract from ALRC 26, vol 1, paras 864 to 866 in Odgers, s., *Uniform Evidence Law: Tenth edition* (2012, Thomson Reuters, Pyrmont) pp. 755 to 756.

rise to a PII claim. Instead, the *Evidence Act* permits material of matters of state to be assessed as to whether there is sufficient public interest in confidentiality of that document or information to outweigh the interest in disclosing or adducing that particular material in Court proceedings. The clear intent has been to provide a mechanism to assess the public interest, and not a list of categories that defines it.

125. That being said, as students in the area examples of categories are often useful. Example categories include:

    a. Cabinet decisions and papers;

    b. National security and defence issues;

    c. Information about inter-governmental and foreign relations;

    d. Information that might disclose the identity of a confidential human source such as an undercover operative or another person who may be at risk of harm or injury if their identity was divulged;

    e. Information about law enforcement methodology that would prejudice future law enforcement operations;

    f. Information about other law enforcement investigations or operations.

C.13 Leading cases in the area

C.13.1 Subpoenas and legitimate forensic purpose

126. The NSW Court of Appeal recently widened the scope of what might be considered a valid LFP in civil matters in *Blacktown City Council*.[25] There is now the possibility that there is a distinction between the requirements of an LFP between civil and criminal cases, but so far the Court of Criminal Appeal has been prepared to deal with subpoena issues without deciding that issue conclusively.

127. Following *Blacktown City Council*, it is clear that in the civil context, so long as the material sought has an "apparent relevance" to the issues in the case and/or bears upon the cross examination of witnesses expected to be called in the proceedings it will have a legitimate forensic purpose.[26]

128. Prior to *Blacktown City Council*, the leading judgement in criminal matters was that of Beasley JA (as her Excellency then was and with whom James and Kirby JJ agreed) in *Attorney-General (NSW) v Chidgey* (2008) 182 A Crim R 536

[25] *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145

[26] See also *Commissioner of Police (NSW) v Fantakis* [2022] NSWCCA 94 at [43] per N Adams J.

(***Chidgey***). *Chidgey* states that the correct test or approach for determining whether a party is required to produce documents under a subpoena is to:

a. Identify a legitimate forensic purpose for which access is sought; and

b. Establish that it is "on the cards" that the documents will materially assist his or her case.

129. Following *Blacktown City Council*, a party that satisfied the "on the cards" approach in *Chidgey* would now represent safe harbour of a clear statement of a valid LFP. However, Bell P (as his Honour the Chief Justice then was, Brereton and McCallum JJA agreeing) established the "apparent relevance" approach would capture a broader range of purposes that would be regarded as valid. Importantly, a party issuing a subpoena need not establish that it will assist their own case rather than bear, one way or the other, on a question to be determined by the Court. To that extent, *Chidgey* has been distinguished as being too narrow an approach in defining what constitutes a valid LFP.

130. As per paragraph [65] of *Blacktown City Council* per Bell P:

> 65 It is sufficient, in my view, to justify a subpoena as having been issued for a legitimate forensic purpose if the documents sought are "apparently relevant" or, to use the words of Nicholas J in *ICAP* at first instance, it can be seen that the documents sought to be produced by way of subpoena will materially assist on an identified issue or there is a reasonable basis beyond speculation that it is likely the documents subpoenaed will so assist. Of course, if it can be shown that the material assistance will be to the party that issued the subpoena, the prospect of the forensic purpose of the issuing party being impugned as illegitimate will be virtually non-existent.

131. As at the time of writing, the Court of Criminal Appeal has not yet found it necessary to decide whether or not *Blacktown City Council* also applies in criminal matters. In both *Waters v Secretary of the Attorney General's Department (Cth)* [2021] NSWCCA 193 (***Waters***) and *Commissioner of Police (NSW) v Fantakis* [2022] NSWCCA 94 (***CoP v Fantakis***) the Court of Criminal Appeal has stated, that whatever approach is adopted, the decision under appeal did not demonstrate any error. In effect, both *Waters* and *CoP v Fatakis* have followed *Blacktown City Council* as establishing the widest available approach to determining whether a valid LFP exists in the matter before the Court, without making any final determination as to whether *Blacktown City Council* is the applicable approach in criminal matters.[27]

132. A purely exploratory subpoena, to determine whether there is anything that could possibly become a viable case for the party requesting the subpoena, is referred to as "fishing" and remains impermissible.

[27] *Commissioner of Police (NSW) v Fantakis* [2022] NSWCCA 94 at [47] per N Adams J.

133. For the PII practitioner dealing with this area of law it appears likely that the formulation of "fishing" will become more and more important as establishing whether or not the subpoena has a valid LFP. That is, the question becomes: is there a reasonable basis beyond mere speculation that the documents sought might assist the Court on an identified issue in the proceedings?[28]

134. While *Chidgey* established that everything that lacked the formulation of a valid LFP was, by definition, fishing, *Blacktown City Council* may have introduced fishing as a distinct concept. That is, it might be "apparently relevant" to examine all warrants, the supporting affidavits (and the criminal intelligence that might be disclosed therein) used in a criminal investigation for validity of the evidence gathering processes, ensuring that any evidence seized is properly admissible – potentially establishing a valid LFP under the *Blacktown City Council* approach. However, there might be no reasonable basis beyond speculation that those documents might assist the Court on any identified issue in the proceedings, and so the subpoena might still be regarded as impermissible fishing and struck out as an abuse of process.

135. Indeed, this is similar to the factual circumstances in *Waters*. In a case involving extradition from Serbia, there was no reasonable basis beyond speculation that the information provided by Australian authorities to Serbian officials that commenced the extradition process could possibly assist the Court. The subpoena was found to be invalid regardless of whether *Blacktown City Council* or *Chidgey* was the correct approach in criminal matters in NSW.

136. We should remember that "relevance" is itself a relatively stringent legal concept, as per s.55 of the *Evidence Act 1995*:

> **55 Relevant evidence**
>
> (1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.
>
> (2) In particular, evidence is not taken to be irrelevant only because it relates only to—
>
> (a) the credibility of a witness, or
>
> (b) the admissibility of other evidence, or
>
> (c) a failure to adduce evidence.

137. So, in that sense, a document does not hold "apparent relevance" merely because it might mention a topic that is to be determined by the Court. The document must hold some evidential value that could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

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[28] *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [65] per Bell P (as his Honour, the Chief Justice, then was).

138. In *Blacktown City Council* both Bell P and Brereton JA noted that the approach to LFP that was said to arise in *Alister* and *Chidgey* took place in a context where the Court was also called upon to consider PII claims. To rely on those authorities in ignorance of that context may have contributed to an error in too narrow an approach in defining what constitutes a valid LFP.[29]

C.13.2 Public interest immunity

139. Many of the relevant decisions in the area have been cited where relevant above. However, by way of brief summary:

a. The test:

i. Production will not be required of documents, although relevant and otherwise admissible, if it would be injurious to the public interest to disclose them: *Sankey v Whitlam* (1978) 142 CLR 1 at 38 per Gibbs CJ;

ii. "*...would the public interest be best served and least injured...by compelling or by refusing to compel disclosure to the Court of the information and of the documents sought by the subpoena?*": *Alister v The Queen* (1984) 154 CLR 404 at 453 per Brennan J;

b. Public interest immunity is a doctrine of substantive law and represents a fundamental immunity: *Jacobson v Rogers* (1995) 182 CLR 572 at 588-589;

c. Public interest immunity is but one form of valid objection to production of documents pursuant to subpoena: *Attorney-General v Stuart* (1994) 34 NSWLR 667 at 672E;

d. In an appropriate case the Court may take an informal "peek" at the documents without their being formally produced: *Conway v Rimmer* (1968) AC 910 at 971, 979, 995; *Attorney-General v Stuart* at 672D;

e. There are a number of well-recognised categories of public interest immunity. However, the categories of public interest immunity are not closed and may alter from time to time: *D v National Society for the Prevention of Cruelty to Children* (1978) AC 171 at 230; see also *Sankey v Whitlam* at 39;

f. The recognised categories of public interest immunity include at least:

i. Cabinet decisions and documents: *Commonwealth v Northern Land Council* (1993) 176 CLR 604;

[29] *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 at [41] and [75] per Bell P, and at [87] to [91] per Brereton JA.

ii. Documents that, if disclosed, would hinder or affect proper policing: *Young v Quinn* (1985) 4 FCR 483 at 494 and 495;

iii. Documents that, if disclosed, would hinder ongoing police investigations: *Attorney-General v Stuart* (1994) 34 NSWLR 667;

iv. Documents that, if disclosed would reveal the identity of a human source or police informer: *Attorney-General v Stuart* (1994) 34 NSWLR 667;

g. A PII claimant will need some time to prepare and run a PII claim and, if necessary, explore avenues of appeal in the case of an order requiring disclosure: *Sankey v Whitlam* (1978) 142 CLR 1 per Gibbs ACJ at 43; *R v Fandakis (No.2)* [2002] NSWCCA 5;

h. It is very rare, but not impossible, for a deponent to an affidavit on a PII claim to be required for cross-examination: *Young v Quin* (1985) 4 FCR 483 at per Bowen CJ at 486.

C.14 Practical tips and pitfalls

C.14.1 Late statements of LFP

140. As is evident from the above, statements of LFP are crucial to the validity of a subpoena and the adjudication of a PII claim.

141. While the requirement that there be a statement of LFP is clear from a long list of leading authority, there is no limit on *when* the statement of LFP can be made.

142. While it can be requested at an early stage in correspondence, a party issuing the subpoena need not provide the LFP until oral submissions during the argument to set aside the subpoena. So long as a valid LFP is eventually stated prior to the application to set aside being determined, the subpoena will be held to be valid.

143. A PII claimant (or their representative) can find themselves adapting to a shifting battleground in a manner which is supposedly dying off in most other areas of modern litigation.

144. It is useful to try to anticipate possible statements of LFP in advance so that you are prepared. If you are able to construct and rebut each “straw man” that can be established in this way, it can assist to demonstrate that the government PII claimant has made more than reasonable efforts to try to anticipate the interests of the accused or issuing party.

145. In that context, it is preferable for a party challenging a subpoena to identify how it is said that the subpoena constitutes fishing, rather than merely state

that it lacks a positive statement of LFP. That is, if possible, it would be preferrable to establish one or more of the following propositions:

a. there is no reasonable basis beyond mere speculation that the documents sought might assist the Court on an identified issue in the proceedings; and/or

b. any documents captured are not "apparently relevant" in that it is not apparent that the documents could hold sufficient evidential value to rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

C.14.2 Credibility of the claimant

146. Every PII claim requires the Court to carefully assess matters of public interest and responsibly weigh that interest for the purposes of the administration of justice in the proceedings before the Court. Necessarily, the PII claimant must only raise serious matters and must not be cavalier with the special protection that is afforded to the state agencies.

147. That requires that the PII claimant jealously guard its credibility before the Court.

148. That in turn requires senior people to be involved as the deponents on any PII affidavits, and often a great deal of work on any PII claim to show that all prior disclosures of information have been considered, not only in the public domain in general but also within the context of the immediate proceedings.

C.14.3 Credibility of the claim itself

149. As discussed above, best practice involves extensive work to establish a PII claim. Attention to detail and realistic assessment of the harm that is likely to eventuate is vital. Two cases illustrate this point.

150. *R v Baladjam (No.31)* [2008] NSWSC 1453 is an example of where the PII claimants went to extensive effort to critically examine the sensitive material in the context of the proceedings. The nature of the public interest immunity was such that the category of material could not be described while the PII respondents, the accused and his co-accused, were in Court. Whealy J had regard to extensive confidential affidavit material that included an affidavit from the Director-General of Security, the head of ASIO. Whealy J was satisfied that substantial harm would result from the disclosure of the sensitive information. However, in the circumstances, it was important to go further. As a result of the efforts of the PII claimant, with the assistance of the PII respondents (as they were able), the Court was able to examine the statements of LFP from the PII respondent, examine the documents and consider an analysis undertaken by the PII claimant. On the basis of that examination the Court concluded that the documents caught by the claim could not be of assistance to the accused in establishing their case(s). In a case where the accused might otherwise have

had some concern that information that could assist them had been kept from them, the Court was able to rule out that possibility.

151. As noted above, the High Court's decision in *AB v CD* is a perhaps the most recent and damning example of a PII claim that should not have been made. However, *Winky Pop Pty Ltd v Mobil Refinery Australia Pty Ltd* [2013] VSC 315 is perhaps a more relevant example for those of us engaged in day-to-day government work.

152. The Plaintiffs brought a civil claim against Mobil and the State of Victoria in relation to contamination from a leak from a petroleum pipeline. The claim against the State alleged a breach of duty of care by reason of a failure to properly supervise and apply the regulatory regime and licence conditions on the pipeline. The documents sought under subpoena included documents from a Ministerial briefing and a planning file that contained advice from local Council and Department staff to the Minister. The matter concerned the Department of Planning and Community Development. Digby J found:

    a. The documents "*are at least of potential importance*" to the Plaintiff's claim for damages;

    b. "*I am not persuaded by either the … affidavit, or the submissions made by the Minister and the [Department], that production and inspection of those documents in this proceeding is likely to prejudice the proper functioning of the government of the State of Victoria. In particular, I am unpersuaded that if advice and recommendations made to the Minister in relation to exercising his statutory functions are disclosed to the parties in this proceeding, before the Minister's decision is made on the matters under consideration, that there is any likely real risk that such a circumstance would interfere with the decision making processes of the Minister or expose the Minister to criticism for a decision that the Minister has yet to make and thus interfere with the Ministerial decision making process.*" At [51];

    c. The relevant documents were not protected by public interest immunity;

    d. In any event, any interest in withholding the documents was outweighed by the Plaintiffs' claims and should be available for disclosure and inspection by the parties to the proceeding;

    e. All of the documents relate to lower levels of government business and were not comparable to cabinet papers;

    f. The nature of the decision to be made by the Minister in this matter was that of an administrative planning decision.

C.14.4 The Mosaic principle

153. The Mosaic principle is a rule of information management. The idea is that tiny pieces of information, put together from disparate sources can create an accurate picture of a particular matter. A '*mosaic*' of such discrete pieces of information can therefore reveal a matter that would otherwise not be disclosed as one complete statement, and therefore the '*mosaic*' can divulge a matter that could otherwise be a matter of public interest immunity.

154. The Courts have recognised this analogy. In *Watson v AWB Ltd (No. 2)* (2009) 259 ALR 524 at [32], Foster J of the Federal Court quoted the Director-General of Security's description of mosaic analysis in reaching the conclusion that subpoenaed documents should be withheld from production on the basis of a PII claim:

> *Mosaic analysis' is a well-established counter-intelligence tool. Mosaic analysis involves combining pieces of information to enable a 'picture' to emerge from which inferences can be drawn by targets, or other persons of interest, about matters not otherwise known to them. Some of the pieces of information may appear to be disparate and/or benign; and specific (but important) items of information may only be known by the target(s) or other persons of interest (making it difficult to precisely assess the risk posed by mosaic analysis in any particular scenario). However, in my opinion there is a very high risk that, disclosure of parts of the subpoenaed documents [referring to the 62 reports], in conjunction with other facts already known to relevant persons, would enable them to draw reliable inferences in relation to sources and methods of intelligence collection of Australia's intelligence partners.*

155. The Courts have stated that the public interest can favour protection of the various pieces of the mosaic, particularly where the identity of a human source or informer is at stake. The Full Federal Court addressed mosaic analysis when considering material where it was said that release of the information might tend to reveal the identity of an informer in *Australian Securities and Investments Commission v P Dawson Nominees Pty Ltd* (2008) 169 FCR 227 at [39] – [40]:

> *There could be little doubt that the transcripts of the examination of the informer(s) themselves would, both directly and circumstantially, identify the informer(s).*
>
> *As to the other documents, we think an appropriate test is whether there is, in the words of Hunt J in Attorney General (NSW) v Stuart (1994) 34 NSWLR 667 at 674:*
>
> > *"any material by which a shrewd idea might be conveyed as to the identity of the informer."*
>
> *Documents taken together may convey information which each by itself could not: Zarro v Australian Securities Commission (1992) 36 FCR at 60.*

His Honour at one stage of the judgment, at [38], spoke of documents which "reveal, or could reveal, or tend to reveal" the fact that the informer provided information to ASIC. Elsewhere, however, his Honour applied a test of whether documents "disclose the identity of" the informer(s) (at [45]) or "identify" the informer(s) as such (at [55]) or whether his or her connection is "disclosed" (at [56]). If actual disclosure or identification is taken as the standard, we think the bar is set too high. Consistently with the underlying public policy of public interest immunity, the benefit of the doubt should be in favour of non-disclosure. There is always the risk that seemingly innocuous information in a particular document, when combined with information in another document or the reader's background knowledge, may reveal the identity of an informer, or at least give rise to strong suspicion. (Emphasis added)

156. Accordingly, mosaic analysis is a powerful analogy in public interest immunity work, but it also represents a number of practical difficulties that can arise in the field.

157. Necessarily, every individual piece of information to be considered for release must be assessed against every prior disclosure. It is devastating to the credibility of a PII claimant to have fought a PII claim, only to have a prior disclosure pointed out by the PII respondent or the judge. The failure to keep track of the prior disclosures can lose the battle, even before the PII claimant enters the field.

158. The Mosaic principle also has onerous consequences because it means that potentially very small pieces of information that might otherwise appear to be harmless, can have devastating results if released. The Court must be taken through such analysis of the information and the harm from the release of that information in great detail in order to establish the claim.

159. The analysis often requires a description of the whole picture that could be revealed by the mosaic to illustrate the point. Once that image is in the mind of the advocate or the presiding judge, it can become more difficult to avoid the presumption that the missing pieces to the mosaic are already obvious and the picture has already been disclosed. Hindsight reasoning can trap both the PII claimant and the judicial officer.

160. Using an analogy to illustrate the point, it is similar to a perception gap that might arise between those people who can see a crossword answer and those people who cannot. Once you have seen the solution, the answer was obvious all along. When you only have two letters out of 13 in front of you and a cryptic reference that you can't solve, nothing seems obvious apart from the inadequacy of your own vocabulary and reasoning processes.

161. The PII claimant with the whole mosaic in front of them can also link clues in a way that a PII respondent might not. To continue the crossword analogy, the person who has seen the answer may consider that there are really 7 out of 13 letters confirmed. The person who has not seen the answer and is still reaching

blindly for the concept may still only be confident of 2 letters and consider the remaining 5 unconfirmed guesses at this stage.

162. Applying the mosaic principle in legal argument requires that the advocate remembers and is able to articulate and persuade the judge that the whole picture is not necessarily obvious yet. The advocate or claimant has to retain the discipline to identify the temptation to engage in hindsight reasoning and be able to assist the judicial officer to refrain from engaging in it. That is, the advocate must be able to explain and persuade the Court that the whole answer is not yet in the public domain. Sometimes it can be the difference between confirmation of a guess, or leaving the matter alive for speculation. Depending on the weight of the various factors, that small difference may be important in the context of the particular PII claim.

163. Otherwise, mosaic analysis can turn the PII claimant, their legal team and sometimes the judge, into the harshest critics of whether information has already been disclosed.

164. It is therefore a double-edged sword. Overlooking prior disclosure can lead to PII claims over material that is already in the public domain. Focussing too much on all of the prior disclosure can lead to giving up the fight too early and risk revealing too much information.

165. The only solution appears to be practice, and hours of careful analysis.

C.14.5 Social media, Twitter and Wikileaks

166. Since the original draft of this paper in 2017 this issue has actually decreased in prevalence. Nevertheless, the risk remains of substantial releases of previously classified information into the public domain through Wikileaks and other intelligence leaking scandals. Such releases pose a risk for the PII claimant. The goalposts of that information which is in the public domain and that which is confidential can move substantially overnight, particularly if the wrong person is using a Twitter account.

167. As mentioned above, prior disclosure of the information you seek to protect, or information like it, can be fatal to making a PII claim. That also applies to information similar to, if not exactly the same as the information that you seek to protect. It can also be damaging to the credibility of the PII claimant if the information is protected in a PII claim one week, and released the next. Judges remember, and understandably they get annoyed. It is a human reaction to suspect that you have been taken advantage of in such circumstances. It is important to remember that confidentiality, and national security, can be time sensitive.

C.14.6 Other ways to contain sensitive material

168. As stated above, *Sankey v Whitlam* and *R v Fandakis (No.2)* establish that a PII claimant should be given opportunity to explore avenues of appeal prior to

complying with an order to disclose or adduce sensitive material into evidence. Nevertheless, sensitive information is sometimes released.

169. This issue more often arises when, despite best efforts, a claim might not have been made before a question was answered in oral evidence or a document was tendered. It can also arise when there has been a production under subpoena and the fact that the documents produced included sensitive or privileged information was not identified until after the production occurred.

170. Sometimes, but not always, the information can be retrieved or the prospect of damage to the public interest reduced through restrictions on the publication or use of the material.

D NON-PUBLICATION ORDERS

171. The methods used to protect this information are slightly different depending on whether the information is recorded in either:

    a. documents produced but not used as evidence; or

    b. answers given in oral evidence in Court or documents that have been tendered.

D.1 Protecting unused documents at common law

172. As is the case with information that is subject to legal professional privilege, the first step is to immediately advise the recipient and the Court of the inadvertent disclosure of sensitive material. Legal practitioners should immediately place the material into a sealed parcel until the issue of whether "the horse has bolted" can be ventilated in Court. The issue should be raised in Court at the first opportunity.

D.1.1 An injunction to restrain the use of confidential information

173. In certain cases, it may be appropriate to apply for an injunction to restrain the disclosure of confidential information.

174. A court will restrain the publication of confidential information improperly or surreptitiously obtained or information imparted in confidence which ought not to be divulged: *Commonwealth v Fairfax* (1980) 147 CLR 39.

175. The applicant must show that the use of the information will be unauthorised and that the use of the information would be to their detriment. Detriment does not extend to mere criticism of government action but does extend to preventing injuries to the public interest such as national security, relations with foreign governments or the ability of government to fulfil its essential functions.

D.1.2 Existing protections for unused material at common law

176. It is important to remember also that documents produced in the context of a proceeding and not admitted into evidence are subject to an implied undertaking that they only be used for the purposes of the proceeding in which they are produced: *Hearne v Street* [2008] HCA 36; (2008) 248 ALR 609. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.

177. Leave of the Court is required before the documents can be put to any use outside of the proceedings. In determining whether to grant leave, release of the documents will not be allowed save in special circumstances and when such use will not occasion any injustice to the person who produced the documents under subpoena: *Premier Travel v Satellite Centres of Australia* [2004] NSWSC 864 per Campbell J at [2].

D.2 Non publication orders in relation to evidence

D.2.1. Court Suppression and Non-publication Orders Act 2010 (NSW)

178. In the case of evidence adduced in proceedings in NSW, there is now a clear mechanism to apply in NSW Courts[30] for an order preventing the publication or disclosure of that material: that of an application under s.7 of the *Court Suppression and Non-publication Orders Act 2010 (NSW)* to suppress or prohibit the publication of the evidence adduced in the proceeding.

179. Such an order can be made on the basis of the grounds set out in s.8(1) of that Act:

    a. the order is necessary to prevent prejudice to the proper administration of justice,

    b. the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,

    c. the order is necessary to protect the safety of any person,

    d. the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),

[30] Defined in s.3 of the Act to include (a) the Supreme Court, Land and Environment Court, District Court, Local Court or Children's Court, and (b) any other court or tribunal, or a person or body having power to act judicially, prescribed by the regulations as a court for the purposes of the Act.

e. it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.

180. Section 9 establishes the procedure by which the application is made. As mentioned above, s.6 establishes that, in deciding whether to make a suppression order or non-publication order, a court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

181. For completeness it is useful to reproduce sections 7, 8 and 9 in full:

> ***7 Power to make orders***
>
> *A court may, by making a suppression order or non-publication order on grounds permitted by this Act, prohibit or restrict the publication or other disclosure of:*
>
> *(a) information tending to reveal the identity of or otherwise concerning any party to or witness in proceedings before the court or any person who is related to or otherwise associated with any party to or witness in proceedings before the court, or*
>
> *(b) information that comprises evidence, or information about evidence, given in proceedings before the court.*
>
> ***8 Grounds for making an order***
>
> *(1) A court may make a suppression order or non-publication order on one or more of the following grounds:*
>
> *(a) the order is necessary to prevent prejudice to the proper administration of justice,*
>
> *(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security,*
>
> *(c) the order is necessary to protect the safety of any person,*
>
> *(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in criminal proceedings involving an offence of a sexual nature (including an act of indecency),*
>
> *(e) it is otherwise necessary in the public interest for the order to be made and that public interest significantly outweighs the public interest in open justice.*

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

9 Procedure for making an order

(1) A court may make a suppression order or non-publication order on its own initiative or on the application of:

(a) a party to the proceedings concerned, or

(b) any other person considered by the court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the court on an application for a suppression order or non-publication order:

(a) the applicant for the order,

(b) a party to the proceedings concerned,

(c) the Government (or an agency of the Government) of the Commonwealth or of a State or Territory,

(d) a news media organisation,

(e) any other person who, in the court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during proceedings or after proceedings have concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the order is limited to achieving the purpose for which the order is made.

182. Section 10 provides that an interim order may be made to cover that part of the hearing that concerns the application for the substantive order sought under the proceedings sections.

D.2.2 NCAT

183. The NSW Civil and Administrative Tribunal is not a Court for the purposes of the *Court Suppression and Non-publication Orders Act 2010 (NSW)*. The *Civil and Administrative Tribunal Act 2013 (NSW)* makes its own provision for such orders. Section 64 of that Act is broadly cast and provides:

> ***64 Tribunal may restrict disclosures concerning proceedings***
>
> *(1) If the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, it may (of its own motion or on the application of a party) make any one or more of the following orders:*
>
> *(a) an order prohibiting or restricting the disclosure of the name of any person (whether or not a party to proceedings in the Tribunal or a witness summoned by, or appearing before, the Tribunal),*
>
> *(b) an order prohibiting or restricting the publication or broadcast of any report of proceedings in the Tribunal,*
>
> *(c) an order prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents lodged with the Tribunal or received in evidence by the Tribunal,*
>
> *(d) an order prohibiting or restricting the disclosure to some or all of the parties to the proceedings of evidence given before the Tribunal, or of the contents of a document lodged with the Tribunal or received in evidence by the Tribunal, in relation to the proceedings.*
>
> *(2) The Tribunal cannot make an order under this section that is inconsistent with section 65.*
>
> *(3) The Tribunal may from time to time vary or revoke an order made under subsection (1).*
>
> *(4) For the purposes of this section, a reference to the name of a person includes a reference to any information, picture or other material that identifies the person or is likely to lead to the identification of the person.*

D.2.3 Coroner's Court

184. Part 6.4 of the *Coroners Act 2009 (NSW)* concerns the disclosure of information. Section 74 is of the most general application and provides:

74 Powers of coroner to clear court and prevent publication of evidence or submissions
(cf Coroners Act 1980, ss 44 (1), (5) and (6) and 45 (1) and (4))

(1) A coroner in coronial proceedings may, if of the opinion that it would be in the public interest to do so, order:

(a) any or all persons (including witnesses in the proceedings) to go and remain outside the room or building in which the proceedings are being heard, or

(b) that any evidence given in the proceedings not be published, or

(c) that any submissions made in the proceedings concerning whether a known person may have committed an indictable offence not be published.

(2) For the purposes of subsection (1), the coroner may, in forming an opinion as to the public interest, have regard (without limitation) to the following matters:

(a) the principle that coronial proceedings should generally be open to the public,

(b) in the case of an order that is proposed to be made in relation to a witness in the proceedings—the likelihood that the evidence of the witness might be influenced by other evidence given in the proceedings if the witness is present when that other evidence is given,

(c) national security,

(d) the personal security of the public or any person.

(3) A person must not contravene an order made under this section.

Maximum penalty: 10 penalty units or imprisonment for 6 months (in the case of an individual) or 50 penalty units (in any other case).

D.3 Federal jurisdiction

185. In the Federal Courts, powers to make suppression orders may be found within the legislation establishing each relevant jurisdiction.

D.3.1 Federal Court of Australia

186. In the Federal Court the power to make suppression orders is set out in Part VAA of the *Federal Court of Australia Act 1976 (Cth).* Division 1 concerns some

preliminary matters, definitions and outlines of the scope of the power. Division 2 is operative.

187. The extent to which the operative sections mirror the language and approach of the *Court Suppression and Non-publication Orders Act 2010 (NSW)* is remarkable. Some relevant sections are extracted below.

> ***37AE Safeguarding public interest in open justice***
>
> *In deciding whether to make a suppression order or non-publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.*
>
> ***37AF Power to make orders***
>
> *(1) The Court may, by making a suppression order or non-publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:*
>
> *(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or*
>
> *(b) information that relates to a proceeding before the Court and is:*
>
> *(i) information that comprises evidence or information about evidence; or*
>
> *(ii) information obtained by the process of discovery; or*
>
> *(iii) information produced under a subpoena; or*
>
> *(iv) information lodged with or filed in the Court.*
>
> *(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).*
>
> ***37AG Grounds for making an order***
>
> *(1) The Court may make a suppression order or non-publication order on one or more of the following grounds:*
>
> *(a) the order is necessary to prevent prejudice to the proper administration of justice;*

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non-publication order must specify the ground or grounds on which the order is made.

37AH Procedure for making an order

(1) The Court may make a suppression order or non-publication order on its own initiative or on the application of:

(a) a party to the proceeding concerned; or

(b) any other person considered by the Court to have a sufficient interest in the making of the order.

(2) Each of the following persons is entitled to appear and be heard by the Court on an application for a suppression order or non-publication order:

(a) the applicant for the order;

(b) a party to the proceeding concerned;

(c) the Government (or an agency of the Government) of the Commonwealth or a State or Territory;

(d) a news publisher;

(e) any other person who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made.

(3) A suppression order or non-publication order may be made at any time during a proceeding or after a proceeding has concluded.

(4) A suppression order or non-publication order may be made subject to such exceptions and conditions as the Court thinks fit and specifies in the order.

(5) A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to

ensure that the court order is limited to achieving the purpose for which the order is made.

188. Section 37AI also makes provision for an interim order to be made to the part of the proceeding where the substantive application for the non-publication order is made.

D.3.2 Federal Circuit Court of Australia

189. Part 6A of the *Federal Circuit Court of Australia Act 1999 (Cth)* effectively mirrors Part VAA of the *Federal Court of Australia Act 1976 (Cth)*. Without repeating the sections again:

a. Section 88E concerns safeguarding the public interest in open justice;

b. Section 88F provides the power to make the orders;

c. Section 88G establishes the grounds for making an order;

d. Section 88H establishes the procedure for making an order; and

e. Section 88J provides for interim orders while the substantive application is being determined.

190. As with the other legislation that follow this model, subsequent sections also provide for, among other things, the duration of the orders, and the consequences for contravening an order.

D.3.3 Administrative Appeals Tribunal

191. As discussed briefly above, the Security Division of the Administrative Appeals Tribunal features some specific rules concerning the ability to receive evidence in confidence from an applicant before the Tribunal.[31] There are also specific provisions for the Attorney General to certify that disclosure of specific information would be prejudicial to the public interest.[32]

192. Section 35 is of more general application to non-publication orders and provides:

> ***35 Public hearings and orders for private hearings, non-publication and non-disclosure***
>
> *Public hearing*
>
> *(1) Subject to this section, the hearing of a proceeding before the Tribunal must be in public.*

[31] See section 39A of the *Administrative Appeals Tribunal Act 1975 (Cth)*
[32] See ss.36 and 36A of the *Administrative Appeals Tribunal Act 1975 (Cth)*

Private hearing

(2) The Tribunal may, by order:

(a) direct that a hearing or part of a hearing is to take place in private; and

(b) give directions in relation to the persons who may be present.

Orders for non-publication or non-disclosure

(3) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure of:

(a) information tending to reveal the identity of:

(i) a party to or witness in a proceeding before the Tribunal; or

(ii) any person related to or otherwise associated with any party to or witness in a proceeding before the Tribunal; or

(b) information otherwise concerning a person referred to in paragraph (a).

(4) The Tribunal may, by order, give directions prohibiting or restricting the publication or other disclosure, including to some or all of the parties, of information that:

(a) relates to a proceeding; and

(b) is any of the following:

(i) information that comprises evidence or information about evidence;

(ii) information lodged with or otherwise given to the Tribunal.

(5) In considering whether to give directions under subsection (2), (3) or (4), the Tribunal is to take as the basis of its consideration the principle that it is desirable:

(a) that hearings of proceedings before the Tribunal should be held in public; and

(b) that evidence given before the Tribunal and the contents of documents received in evidence by the Tribunal should be made available to the public and to all the parties; and

(c) that the contents of documents lodged with the Tribunal should be made available to all the parties.

However (and without being required to seek the views of the parties), the Tribunal is to pay due regard to any reasons in favour of giving such a direction, including, for the purposes of subsection (3) or (4), the confidential nature (if applicable) of the information.

Not applicable to Security Division review of security assessment

(6) This section does not apply in relation to a proceeding in the Security Division to which section 39A applies.

Note: See section 35AA.

E PARLIAMENTARY PRIVILEGE

193. Parliamentary privilege is a unique privilege of Parliament that is designed to protect the free flow of information to the legislature. In essence, whether submissions to parliament have been made public or not, communications to parliament may not themselves be used to prove certain facts in Court proceedings.

194. The privilege is therefore not one of confidentiality, but of use. The underlying policy is that any person should feel free to provide information to parliament without then being called forth in Court to repeat the submission, to prove the matter in Court proceedings. If such a person is not free in this way, the disincentive of involvement in Court proceedings may stifle the flow of information to the legislature, which is held to be imperative to the proper function of that arm of government.

195. The primary manifestations of the privilege are:

a. The protection from defamation in relation to statements made in parliament;

b. The exclusion from evidence of any documentary submission made to parliament; and

c. The extensive power of parliament to compel production of material to parliament.

196. The topic is itself quite broad, and can only be briefly introduced here.

197. In New South Wales the privilege remains an emanation of the common law, the doctrine of reasonable necessity and Article 9 of the *Bill of Rights 1689*. At the Commonwealth level, the privilege is codified as it applies to the Commonwealth Parliament through both s.49 of the *Constitution* and in the *Parliamentary Privileges Act 1987 (Cth)*.

E.1 Parliamentary privilege in New South Wales

E.1.1 Disclosure of material to Parliament

198. In New South Wales, the High Court has held that the doctrine of reasonable necessity and Westminster responsibility requires that Parliament is able to compel agencies to produce information to it: *Egan v Willis* (1998) 195 CLR 424.

199. It is perhaps difficult for the executive of government to resist a directive of the legislature to provide it with certain information. Public interest immunity cannot protect a government from the obligation to disclose information to itself.

200. Perhaps the most productive response is to approach the relevant Minister as necessary, and for any application to protect information to commence from the premise that agency may make a submission as to appropriate restrictions on the publication of the information outside of parliament beyond the specific purposes of the enquiry that is being conducted.

E.1.2 Disclosure to the Courts

201. As an emanation of the common law, the concept of parliamentary privilege is recognised within the jurisprudence on PII claims. As noted above, the authorities have recognised that the strong public interest in protecting communications to parliament suggests that cabinet-in-confidence documents are perhaps one "class" of documents where the PII is likely to be upheld despite the general obligation to focus on the individual content of each communication.

202. Article 9 of the *Bill of Rights 1689* is the starting point of such analysis and, to paraphrase, it states:

> *That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.*

203. An example arose in relation to allegations made by the Hon Franca Arena that there had been a conspiracy to cover up paedophilia in NSW. Police issued an order to Mrs Arena to produce communications to her that she had referred to in making the allegation in parliament. The question of whether Mrs Arena had to produce these documents was determined through the making of a PII claim. When he was at the bar, Gaegler J appeared for Ms Arena and contended that:

> *The application of the principles of public interest immunity to information provided in confidence to a member of Parliament relating to a matter of public interest is, in my opinion, particularly strong.*[33]

[33] Gageler S SC (as his Honour then was), 'Matter of the Royal Commission into the New South Wales Police Service – Opinion', 22 November 1996, p 18.

E.2 Parliamentary Privilege of the Commonwealth

204. As stated above, section 49 of the Constitution is relevant and provides:

> ***49 Privileges etc. of Houses***
>
> *The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.*

205. It is through this mechanism that Article 9 of the *Bill of Rights 1689* was effectively incorporated into the law of the Commonwealth, to the extent that it had not yet been incorporated into each of the pre-existing States.

206. The Commonwealth Parliament has made declarations under s.49 of the Constitution, and the *Parliamentary Privileges Act 1987 (Cth)* (**the PPA**) is regarded as such a declaration.

207. The PPA is primarily concerned with defining the extent to which parliamentary documents and information may be used outside of parliament, and does not address any restriction on Parliament to compel government agencies to produce information to it.

208. The primary section that governs the use of parliamentary information in Court proceedings is section 16 which states:

> ***16 Parliamentary privilege in court proceedings***
>
> *(1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.*
>
> *(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:*
>
> *(a) the giving of evidence before a House or a committee, and evidence so given;*
>
> *(b) the presentation or submission of a document to a House or a committee;*

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

(a) a question arising under section 57 of the Constitution; or

(b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of

proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

209. Importantly, unless s.16(4) is engaged in relation to a hearing in camera, s.16(3) does not operate to prohibit the production of a document, merely its use or tender. To exclude such a document from production under a subpoena, it would be necessary to establish that no legitimate forensic purpose could attach to the parliamentary document.

210. As it is a statutory prohibition on the tender of the evidence, rendering any such tender unlawful, the parliamentary privilege in s.16(3) is not capable of being waived.

F SPECIALTY MECHANISMS

F.1 Criminal prohibitions on disclosure

211. It is useful to remember that there are often specific statutory prohibitions on the disclosure or use of particularly sensitive pieces of government information. It is perhaps impossible to attempt to be comprehensive in relation to all of these mechanisms.

212. They are important to be aware of because, most often, the prohibition on disclosure is enforced by establishing a criminal offence for the release of the information.

213. These prohibitions make life difficult for the practitioner in the field. Necessarily the lawyer managing this information becomes aware of the underlying material in the course of their work. Often the lawyer is required to raise the existence of the prohibition in Court, to alert the Court to the need to protect the information.

214. Necessarily that act can often risk contravening the very prohibitions and offences that are created to protect the information.

215. This aspect of the field illustrates the rigour that is required. It is not often that a brief carries with it a risk of committing an offence if an oral submission in Court is phrased without sufficient caution.

216. The following are some specific measures to be aware of:

    a. *Witness Protection Act 1995 (NSW)*: Section 32 establishes an offence of 10 years imprisonment if a person discloses information about the identity or location of a person who is a participant in a witness protection program. It is difficult to explain to a Court why certain orders might be necessary to protect a witness without listing at least a pseudonym or the former identity of a witness that is under the protection of the Act.

    b. *Telecommunications (Interception and Access) Act 1979 (Cth)*: Unless specifically authorised, disclosing interception information in Court proceedings may constitute an offence under s.105 of that Act (see also ss.7 and 63 of that Act), punishable by 2 years in prison.

    c. *Australian Security Intelligence Organisation Act 1979 (Cth)*: Section 18 creates an offence for disclosure of intelligence information without the specific authorisation of the Director General, punishable by 10 years imprisonment. Section 92 establishes an offence punishable by 10 years imprisonment if the identity of an ASIO officer is made public.

    d. The *Intelligence Services Act 2001 (Cth)* consolidates legislation for the Australian Secret Intelligence Services (**ASIS**), the Australian Signals Directorate (**ASD**), the Australian Geo-spatial Intelligence Organisation (**AGO**) and certain provisions in relation to the division with the Department of Defence that is referred to as the Defence Intelligence Organisation (**DIO**). Part 6, Division 1 of that Act establishes certain offences relating to secrecy of those organisations:

        i. In relation to ASIS:

            1. Section 39 – Unauthorised communication of ASIS information – an offence with a penalty of imprisonment for 10 years;[34]

            2. Section 40C – Unauthorised dealing with ASIS records – an offence with a penalty of imprisonment for 3 years;[35]

            3. Section 40D – Unauthorised recording of information or matter relating to ASIS – an offence with a penalty of imprisonment for 3 years;[36]

[34] To the extent that this offence related to the discontinued charges against Mr Colleary QC, at the time of the alleged conduct, the indicated maximum penalty was 2 years and/or 120 penalty units, not 10 years as at the date of writing this paper.
[35] This was not an offence as at the time of the alleged conduct of Mr Collaery QC.
[36] This was not an offence as at the time of the alleged conduct of Mr Collaery QC.

4. Section 41 – Publication of identity of ASIS staff – an offence with a penalty of imprisonment for 10 years.[37]

ii. In relation to AGO:

1. Section 39A – Unauthorised communication of AGO information – an offence with a penalty of imprisonment for 10 years;

2. Section 40E – Unauthorised dealing with AGO records – an offence with a penalty of imprisonment for 3 years;

3. Section 40F – Unauthorised recording of information or matter relating to AGO – an offence with a penalty of imprisonment for 3 years.

iii. In relation to ASD:

1. Section 40 – Unauthorised communication of ASD information – an offence with a penalty of imprisonment for 10 years;

2. Section 40G – Unauthorised dealing with ASD records – an offence with a penalty of imprisonment for 3 years;

3. Section 40H – Unauthorised recording of information relating to ASD – an offence with a penalty of imprisonment for 3 years.

iv. In relation to DIO:

1. Section 40B – Unauthorised communication of DIO information – an offence with a penalty of imprisonment for 10 years

2. Section 40L – Unauthorised dealing with DIO records – an offence with a penalty of imprisonment for 3 years

3. Section 40M – Unauthorised recording of information relating to DIO – an offence with a penalty of imprisonment for 3 years.[38]

[37] By way of indication, at the time of the conduct previously alleged against Mr Colleary QC, at the time of the alleged conduct, the indicated maximum penalty was 1 year and/or 60 penalty units, not 10 years as at the date of writing this paper.

[38] AGO, ASD and DIO are crucial elements of Australia's intelligence community, but do not have the same secrecy provisions in relation to the staff of those organisations as ASIO or ASIS.

217. More broadly, there are also specific prohibitions on people that are subject to questioning warrants before ASIO, the Australian Criminal Intelligence Commission (**ACIC**)[39] and the NSW Crime Commission in revealing that they have attended before those authorities to give evidence or information:

    a. ACIC – Under section 28 of the *Australian Crime Commission Act 2002 (Cth)*, an examiner may summon a person to give evidence before the Commission. Under section 29A, the summons may feature a notation that prohibits the recipient from disclosing the existence of the summons and any information in relation to the summons. Under section 29B, a disclosure contrary to any such notation is an offence punishable by a penalty of imprisonment for 2 years, or 120 penalty units, or both;

    b. ASIO – Section 34GF of the *Australian Security Intelligence Organisation Act 1979 (Cth)* establishes an offence that does not require any notation. The nature of an ASIO questioning warrant is inherently under a restriction against disclosure that a person is subject to it. Breaching these restrictions is an offence punishable by a penalty of imprisonment for 5 years;

    c. NSW Crime Commission – Subsection 45(1) of the *Crime Commission Act 2012 (NSW)* permits the Commission to direct that a person must not "publish" (a) any evidence given before the Commission, (b) the contents or description of any document or thing produced to the Commission or seized by it under warrant, (c) any information that might enable the identification or location of a witness before the Commission, or (d) the fact that someone has given or is about to give evidence to the Commission in a hearing. Under s.45(3), contravening such a direction is an offence punishable by 2 years imprisonment, 100 penalty units or both.

F.2 National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

218. The *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (**the NSI Act**) can apply to either criminal proceedings or to civil proceedings.

219. Under section 6, where the prosecution gives notice in writing to the defendant in a Federal criminal proceeding, the NSI Act applies to the proceeding from that point.

220. Under section 6A, the Commonwealth Attorney-General provides the notice in writing to the parties to the civil litigation.

221. The effect of the application of the NSI Act has the following primary consequences:

[39] ACIC was established in 2016 as the result of the merger of the Australian Crime Commission and CrimTrac.

a. It creates an obligation to have a pre-trial conference or hearing to determine the way in which national security information will be handled in the proceedings;[40]

b. It provides a mechanism to in effect reproduce the handling restrictions on classified material to the national security information that might be considered in the proceedings;[41]

c. It creates an obligation on parties to notify the Attorney-General if that party anticipates that they are likely to bring about the disclosure of national security information in the course of the proceedings;[42]

d. It establishes a separate statutory regime for the Attorney-General to certify as to certain information that may not be disclosed in the proceedings;[43]

e. Provides a statutory mechanism for review of such certification and the determination of PII claims;[44]

f. Establishes closed Court requirements for dealing with national security information.[45]

222. As noted in the introduction above, the Independent National Security Legislation Monitor (INSLM), Grant Donaldson SC has reported on the Witness J case, which was held entirely in secret. That report was highly critical of the manner in which Witness J had been tried, prosecuted and sentenced in complete secrecy under the NSI Act. The Attorney-General has requested that the INSLM conduct a review of the NSI Act as a whole as a result.

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[40] In that, once the NSI Act applies to the proceedings, unless the Court holds a hearing under ss.19(1A) or (3A) and makes orders about how national security information in the proceedings will be handled, the default provisions under Part 2 of the *National Security Information (Criminal and Civil Proceedings) Regulations 2015 (Cth)* will apply.

[41] The combined effect of orders made by the Court under ss.19(1A), (3A) or s.22 and Part 2 of the *National Security Information (Criminal and Civil Proceedings) Regulations 2015 (Cth)*, noting that in many ways Part 2 of the Regulations operates as a floor or minimum base level of protection, replicate many of the Commonwealth security handling procedures for classified information.

[42] Section 24 creates this obligation in criminal proceedings. Section 38D creates this obligation in civil proceedings. See also section 25 and 38E in relation to the procedure for an answer from a witness that might disclose national security information in the proceedings.

[43] Section 26 establishes the certification procedure in criminal proceedings. Section 38F governs certificates from the Attorney in civil proceedings. Sections 28 and 38H allow the Attorney-General to certify that the parties must not call a certain witness to give evidence where that witness is likely to disclose national security information.

[44] Where any of the certification mechanisms are engaged, the Court is required to hold a hearing to determine whether an order under ss 31 (criminal), 38J or 38L (civil) of the NSI Act should be made.

[45] See sections 29 (criminal) and 38I (civil) in relation to the closed court requirements under the NSI Act.

223. Without prejudicing that review in anyway, it is useful to note that the NSI Act is now approximately 18 years old. Attorney's-General of both Labor and Coalition governments have overseen its application in many of the most serious terrorism prosecutions that Australia has experienced in that time. The Witness J case raises serious questions about safeguards as to the operation of the NSI Act and that in itself may provide rich grounds or the review. However, at this stage, I would expect the NSI Act to continue to be a feature of Australia's legal system for some time to come. Amendment rather than repeal appears more likely.

G CONCLUSION

224. Hopefully this paper has served as an introduction to the primary mechanisms used to control government information in legal proceedings, and the stringent requirements on lawyers when involved in that task.

225. It is useful to remember that, while all government lawyers should be familiar with this area to some extent, there is an inherent specialisation built into the system. At both State and Commonwealth level, directions by the relevant Attorneys-General establish that protecting government information is tied work that may only be performed by the Crown Solicitor's Office in NSW, or the Australian Government Solicitor federally.

226. Most often, if you are dealing with parliamentary information or with intercepted telecommunications material you are already aware that protections and restrictions on the use of that material exist.

227. Experience suggests that the primary discipline of the field is more an understanding of how to practically manage the demands of working with this sort of information. It is understanding the expectations of the Court in relation to the important role in administering justice that defines the field.

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